FORM NLRB-502 (RC)
(4-15)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

RC PETITION

DO NOT WRITE IN THIS SPACE	
Case No. 21-RC-289115	Date Filed 1-19-2022

INSTRUCTIONS: Unless e-Filed using the Agency's website, www.nlrb.gov, submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.

1. **PURPOSE OF THIS PETITION: RC-CERTIFICATION OF REPRESENTATIVE -** A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. **The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.**

2a. Name of Employer	2b. Address(es) of Establishment(s) involved *(Street and number, city, State, ZIP code)*
XPO Logistics Cartage, LLC dba XPO Logistics	see attachment

3a. Employer Representative – Name and Title	3b. Address (If same as 2b – state same)
Brad Jacobs- Chairman and CEO	5 American Ln., Greenwich, CT 06831

3c. Tel. No.	3d. Cell No.	3e. Fax No.	3f. E-Mail Address
855 976 6951		888 890 3874	Bradley.Jacobs@xpo.com

4a. Type of Establishment *(Factory, mine, wholesaler, etc.)*	4b. Principal product or service	5a. City and State where unit is located:
Trucking	Drayage	see attachment

5b. Description of Unit Involved

Included: see attachment

Excluded: see attachment

6a. No. of Employees in Unit: approx. 250

6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? Yes ☑ No ☐

Check One:

☑ 7a. Request for recognition as Bargaining Representative was made on (Date) 01/12/2022 and Employer declined recognition on or about 1/12/2022 (Date) *(If no reply received, so state).*

☐ 7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8a. Name of Recognized or Certified Bargaining Agent *(If none, so state).*	8b. Address
NONE	

8c. Tel No.	8d Cell No.	8e. Fax No.	8f. E-Mail Address

8g. Affiliation, if any	8h. Date of Recognition or Certification	8i. Expiration Date of Current or Most Recent Contract, if any *(Month, Day, Year)*

9. Is there now a strike or picketing at the Employer's establishment(s) involved? No If so, approximately how many employees are participating? _____

(Name of labor organization) _____, has picketed the Employer since *(Month, Day, Year)* _____.

10. Organizations or individuals other than Petitioner and those named in items 8 and 9, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5b above. *(If none, so state)*

None

10a. Name	10b. Address	10c. Tel. No.	10d. Cell No.
		10e. Fax No.	10f. E-Mail Address

11. **Election Details:** If the NLRB conducts an election in this matter, state your position with respect to any such election.		11a. Election Type: ☑ Manual ☐ Mail ☐ Mixed Manual/Mail
11b. Election Date(s): Thursday, February 10	11c. Election Time(s): 6:00am to 9:00am AND 3:00pm to 7:00pm	11d. Election Location(s): Break/Meeting room at both facilities

12a. Full Name of Petitioner (*including local name and number*)	12b. Address *(street and number, city, state, and ZIP code)*
Teamsters Local 848 and Teamsters Local 542 (see attachment)	see attachment

12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent *(if none, so state)*

International Brotherhood of Teamsters

12d. Tel No.	12e. Cell No.	12f. Fax No.	12g. E-Mail Address
see attachment	see attachment	see attachment	see attachment

13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.

13a. Name and Title	13b. Address *(street and number, city, state, and ZIP code)*
Julie Gutman Dickinson, Attorney	801 N Brand Blvd, Suite 950, Glendale, CA 91203

13c. Tel No.	13d. Cell No.	13e. Fax No.	13f. E-Mail Address
818 973 3228	213 200 0260	818 973 3201	jgd@bushgottlieb.com

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name *(Print)*	Signature	Title	Date
Julie Gutman Dickinson	Julie Gutman Dickinson	Attorney	01/19/22

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Attachment to RC Petition **Case 21-RC-289115 1-19-2022**
Filed: January, 19, 2022
Employer: XPO Logistics Cartage, LLC dba XPO Logistics

2b. Addresses of Establishments Involved

5800 Sheila St.
Los Angeles, CA 90040
Attention Jeff Freeman
Jeff.Freeman@xpo.com

10250 Airway Rd.
San Diego, CA 92154
Attention Raymond Limuaco
Raymond.Limuaco@xpo.com

5a. City and State Where Unit is Located

Los Angeles, CA

San Diego, CA

5b. Description of Unit Involved

Included: All full-time and regular part-time drivers employed by XPO Logistics Cartage, LLC dba XPO Logistics, at its Commerce location at 5800 Sheila St., Los Angeles, CA 90040 and its San Diego location at 10250 Airway Rd., San Diego, CA 92154.

Excluded: Drivers whose services are procured through a staffing agency or any other temporary services agency and all other employees, office clerical employees, professional employees, managerial employees, guards and supervisors as defined in the Act.

12a-b and 12d-g. Full Name of Petitioner and Address, Telephone Number, Cell Number, Fax Number and E-mail address

Teamsters Local 848
3888 Cherry Ave.
Long Beach, CA 90807
E-mail: erictate@local848.net
Cell: (626) 712-7329
Office: (562) 595-1891
Fax: (562) 595-1896

Teamsters Local 542
4666 Mission Gorge Pl
San Diego, CA 92120
E-mail: jvasquez@teamsters542.org
Office: (619) 582-0542
Fax: (619) 582-0059

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 21
US Court House, Spring Street
312 N Spring Street, 10th Floor
Los Angeles, CA 90012

Agency Website: www.nlrb.gov
Telephone: (213)894-5200
Fax: (213)894-2778

Download
NLRB
Mobile App

January 19, 2022

URGENT

XPO Logistics Cartage, LLC dba XPO Logistics
5800 Sheila St.
Los Angeles, CA 90040

XPO Logistics Cartage, LLC dba XPO Logistics
10250 Airway Road
San Diego, CA 92154

Re: XPO Logistics Cartage, LLC dba XPO Logistics
Case 21-RC-289115

Dear Sir or Madam:

Enclosed is a copy of a petition that Teamsters Local 848 filed with the National Labor Relations Board (NLRB) seeking to represent certain of your employees. After a petition is filed, the employer is required to promptly take certain actions so please read this letter carefully to make sure you are aware of the employer's obligations. This letter tells you how to contact the Board agent who will be handling this matter, about the requirement to post and distribute the Notice of Petition for Election, the requirement to complete and serve a Statement of Position Form, the Petitioner's requirement to complete and serve a Responsive Statement of Position Form, a scheduled hearing in this matter, other information needed including a voter list, your right to be represented, and NLRB procedures, including how to submit documents to the NLRB.

Investigator: This petition will be investigated by Field Attorney STEPHEN SIMMONS whose telephone number is (213)634-6509. The Board agent will contact you shortly to discuss processing the petition. If you have any questions, please do not hesitate to call the Board agent. If the agent is not available, you may contact Assistant to the Regional Director NATHAN M. SEIDMAN whose telephone number is (213)634-6518. The Board agent may also contact you and the other party or parties to schedule a conference meeting or telephonic or video conference for some time before the close of business the day following receipt of the final Responsive Statement(s) of Position. This will give the parties sufficient time to determine if any issues can be resolved prior to hearing or if a hearing is necessary. If appropriate, the NLRB attempts to schedule an election either by agreement of the parties or by holding a hearing and then directing an election.

Required Posting and Distribution of Notice: You must post the enclosed Notice of Petition for Election by January 26, 2022 in conspicuous places, including all places where notices to employees are customarily posted. The Notice of Petition for Election must be posted so all pages are simultaneously visible. If you customarily communicate electronically with employees in the petitioned-for unit, you must also distribute the notice electronically to them. You must maintain the posting until the petition is dismissed or withdrawn or this notice is replaced by the Notice of Election. Posting and distribution of the Notice of Petition for Election will inform the employees whose representation is at issue and the employer of their rights and obligations under the National Labor Relations Act in the representation context. Failure to post or distribute the notice may be grounds for setting aside an election if proper and timely objections are filed.

Required Statement of Position: In accordance with Section 102.63(b) of the Board's Rules, the employer is required to complete the enclosed Statement of Position form (including the attached Commerce Questionnaire), have it signed by an authorized representative, and file a completed copy (with all required attachments) with this office and serve it on all parties named in the petition such that it is received by them by **noon Pacific Time** on **January 31, 2022**. This form solicits information that will facilitate entry into election agreements or streamline the pre-election hearing if the parties are unable to enter into an election agreement. **This form must be e-Filed, but unlike other e-Filed documents, will *not* be timely if filed on the due date but after noon January 31, 2022.** If you have questions about this form or would like assistance in filling out this form, please contact the Board agent named above.

List(s) of Employees: The employer's Statement of Position must include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. If the employer contends that the proposed unit is inappropriate, the employer must separately list the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit to make it an appropriate unit. The employer must also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx

Failure to Supply Information: Failure to supply the information requested by this form may preclude you from litigating issues under Section 102.66(d) of the Board's Rules and Regulations. Section 102.66(d) provides as follows:

> A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and

presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§ 102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

Responsive Statement of Position: In accordance with Section 102.63(b) of the Board's Rules, following timely filing and service of an employer's Statement of Position, the petitioner is required to complete the enclosed Responsive Statement of Position form, have it signed by an authorized representative, and file a completed copy with any necessary attachments, with this office and serve it on all parties named in the petition responding to the issues raised in the employer's Statement of Position, such that it is received no later than **noon Pacific Time** on **February 03, 2022.**

Notice of Hearing: Enclosed is a Notice of Representation Hearing to be conducted at **9:00 AM** on **Tuesday, February 8, 2022 via videoconference**, if the parties do not voluntarily agree to an election. If a hearing is necessary, the hearing will run on consecutive days until concluded unless the regional director concludes that extraordinary circumstances warrant otherwise. Before the hearing begins, the NLRB will continue to explore potential areas of agreement with the parties in order to reach an election agreement and to eliminate or limit the costs associated with formal hearings.

Upon request of a party showing good cause, the regional director may postpone the hearing. A party desiring a postponement should make the request to the regional director in writing, set forth in detail the grounds for the request, and include the positions of the other parties regarding the postponement. E-Filing the request is required. A copy of the request must be served simultaneously on all the other parties, and that fact must be noted in the request.

Other Information Needed Now: Please submit to this office, as soon as possible, the following information needed to handle this matter:

(a) A copy of any existing or recently expired collective-bargaining agreements, and any amendments or extensions, or any recognition agreements covering any of your employees in the unit involved in the petition (the petitioned-for unit);

(b) The name and contact information for any other labor organization (union) claiming to represent any of the employees in the petitioned-for unit;

(c) If potential voters will need notices or ballots translated into a language other than English, the names of those languages and dialects, if any.

(d) If you desire a formal check of the showing of interest, you must provide an alphabetized payroll list of employees in the petitioned-for unit, with their job classifications, for the payroll period immediately before the date of this petition. Such a payroll list should be submitted as early as possible prior to the hearing. Ordinarily a formal check of the showing of interest is not performed using the employee list submitted as part of the Statement of Position.

Voter List: If an election is held in this matter, the employer must transmit to this office and to the other parties to the election, an alphabetized list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular telephone numbers) of eligible voters. Usually, the list must be furnished within 2 business days of the issuance of the Decision and Direction of Election or approval of an election agreement. I am advising you of this requirement now, so that you will have ample time to prepare this list. The list must be electronically filed with the Region and served electronically on the other parties. To guard against potential abuse, this list may not be used for purposes other than the representation proceeding, NLRB proceedings arising from it or other related matters.

Right to Representation: You have the right to be represented by an attorney or other representative in any proceeding before us. If you choose to be represented, your representative must notify us in writing of this fact as soon as possible by completing Form NLRB-4701, Notice of Appearance. This form is available on our website, www.nlrb.gov, or at the Regional office upon your request.

If someone contacts you about representing you in this case, please be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the NLRB. Their knowledge regarding this matter was only obtained through access to information that must be made available to any member of the public under the Freedom of Information Act.

Procedures: Pursuant to Section 102.5 of the Board's Rules and Regulations, parties must submit all documentary evidence, including statements of position, exhibits, sworn statements, and/or other evidence, by electronically submitting (E-Filing) them through the Agency's web site (www.nlrb.gov). You must e-file all documents electronically or provide a written statement explaining why electronic submission is not possible or feasible. Failure to comply with Section 102.5 will result in rejection of your submission. The Region will make its determinations solely based on the documents and evidence properly submitted. All evidence submitted electronically should be in the form in which it is normally used and maintained in the course of business (i.e., native format). Where evidence submitted electronically is not in native format, it should be submitted in a manner that retains the essential functionality of the native format (i.e., in a machine-readable and searchable electronic format). If you have questions about the submission of evidence or expect to deliver a large quantity of electronic records, please promptly contact the Board agent investigating the petition.

Information about the NLRB and our customer service standards is available on our website, www.nlrb.gov, or from an NLRB office upon your request. We can provide assistance for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,

William B. Cowen
Regional Director

Enclosures

1. Petition
2. Notice of Petition for Election (Form 5492)
3. Notice of Representation Hearing
4. Description of Procedures in Certification and Decertification Cases (Form 4812)
5. Statement of Position form and Commerce Questionnaire (Form 505)
6. Responsive Statement of Position (Form 506)

WBC/js

Form NLRB-5492
(Rev: 12-2015)

National Labor Relations Board

NOTICE OF PETITION FOR ELECTION

This notice is to inform employees that Teamsters Local 848 has filed a petition with the National Labor Relations Board (NLRB), a Federal agency, in Case 21-RC-289115 seeking an election to become certified as the representative of the employees of XPO Logistics Cartage, LLC dba XPO Logistics in the unit set forth below:

Included: All full-time and regular part-time drivers employed by XPO Logistics Cartage, LLC dba XPO Logistics, at its Commerce location at 5800 Sheila St., Los Angeles, CA 90040 and its San Diego location at 10250 Airway Rd., San Diego, CA 92154.

Excluded: Drivers whose services are procured through a staffing agency or any other temporary services agency and all other employees, office clerical employees, professional employees, managerial employees, guards and supervisors as defined in the Act.

This notice also provides you with information about your basic rights under the National Labor Relations Act, the processing of the petition, and rules to keep NLRB elections fair and honest.

YOU HAVE THE RIGHT under Federal Law

- **To self-organization**
- **To form, join, or assist labor organizations**
- **To bargain collectively through representatives of your own choosing**
- **To act together for the purposes of collective bargaining or other mutual aid or protection**
- **To refuse to do any or all of these things unless the union and employer, in a state where such agreements are permitted, enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustments).**

PROCESSING THIS PETITION

Elections do not necessarily occur in all cases after a petition is filed. NO FINAL DECISIONS HAVE BEEN MADE YET regarding the appropriateness of the proposed unit or whether an election will be held in this matter. If appropriate, the NLRB will first see if the parties will enter into an election agreement that specifies the method, date, time, and location of an election and the unit of employees eligible to vote. If the parties do not enter into an election agreement, usually a hearing is held to receive evidence on the appropriateness of the unit and other issues in dispute. After a hearing, an election may be directed by the NLRB, if appropriate.

IF AN ELECTION IS HELD, it will be conducted by the NLRB by secret ballot and Notices of Election will be posted before the election giving complete details for voting.

ELECTION RULES

The NLRB applies rules that are intended to keep its elections fair and honest and that result in a free choice. If agents of any party act in such a way as to interfere with your right to a free election, the election can be set aside by the NLRB. Where appropriate the NLRB provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with employees' rights and may result in setting aside the election:

- **Threatening loss of jobs or benefits by an employer or a union**
- **Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises**
- **An employer firing employees to discourage or encourage union activity or a union causing them to be fired to encourage union activity**
- **Making campaign speeches to assembled groups of employees on company time, where attendance is mandatory, within the 24-hour period before the polls for the election first open or, if the election is conducted by mail, from the time and date the ballots are scheduled to be sent out by the Region until the time and date set for their return**
- **Incitement by either an employer or a union of racial or religious prejudice by inflammatory appeals**
- **Threatening physical force or violence to employees by a union or an employer to influence their votes**

Please be assured that IF AN ELECTION IS HELD, every effort will be made to protect your right to a free choice under the law. Improper conduct will not be permitted. All parties are expected to cooperate fully with the NLRB in maintaining basic principles of a fair election as required by law. The NLRB as an agency of the United States Government does not endorse any choice in the election.

For additional information about the processing of petitions, go to www.nlrb.gov or contact the NLRB at (213)894-5200.

THIS IS AN OFFICIAL GOVERNMENT NOTICE AND MUST NOT BE DEFACED BY ANYONE. IT MUST REMAIN POSTED WITH ALL PAGES SIMULTANEOUSLY VISIBLE UNTIL REPLACED BY THE NOTICE OF ELECTION OR THE PETITION IS DISMISSED OR WITHDRAWN.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

XPO LOGISTICS CARTAGE, LLC DBA XPO LOGISTICS **Employer** **and** **TEAMSTERS LOCAL 848, TEAMSTERS LOCAL 542** **Petitioner**	**Case 21-RC-289115**

NOTICE OF REPRESENTATION HEARING

The Petitioner filed the attached petition pursuant to Section 9(c) of the National Labor Relations Act. It appears that a question affecting commerce exists as to whether the employees in the unit described in the petition wish to be represented by a collective-bargaining representative as defined in Section 9(a) of the Act.

YOU ARE HEREBY NOTIFIED that, pursuant to Sections 3(b) and 9(c) of the Act, at 9:00 AM on **Tuesday, February 8, 2022** and on consecutive days thereafter until concluded, via videoconference, a hearing will be conducted before a hearing officer of the National Labor Relations Board. At the hearing, the parties will have the right to appear via videoconfernce, and give testimony.

YOU ARE FURTHER NOTIFIED that, pursuant to Section 102.63(b) of the Board's Rules and Regulations, XPO Logistics Cartage, LLC dba XPO Logistics must complete the Statement of Position and file it and all attachments with the Regional Director and serve it on the parties listed on the petition such that is received by them by no later than **noon** Pacific time on January 31, 2022**.** Following timely filing and service of a Statement of Position by XPO Logistics Cartage, LLC dba XPO Logistics, the Petitioner must complete its Responsive Statement of Position(s) responding to the issues raised in the Employer's and/or Union's Statement of Position and file them and all attachments with the Regional Director and serve them on the parties named in the petition such they are received by them no later than **noon** Pacific on February 03, 2022.

Pursuant to Section 102.5 of the Board's Rules and Regulations, all documents filed in cases before the Agency must be filed by electronically submitting (E-Filing) through the Agency's website (www.nlrb.gov), unless the party filing the document does not have access to the means for filing electronically or filing electronically would impose an undue burden. Documents filed by means other than E-Filing must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Detailed instructions for using the NLRB's E-Filing system can be found in the E-Filing System User Guide

The Statement of Position and Responsive Statement of Position must be E-Filed but, unlike other E-Filed documents, must be filed by **noon** Pacific on the due date in order to be timely. If an election agreement is signed by all parties and returned to the Regional Office before the due date of the Statement of Position, the Statement of Position and Responsive Statement of Position are not required to be filed. If an election agreement is signed by all parties and returned to the Regional office after the due date of the Statement of Position but before the due date of the Responsive Statement of Position, the Responsive Statement of Position is not required to be filed.

Dated: January 19, 2022

William B. Cowen
Regional Director
National Labor Relations Board
Region 21
US Court House, Spring Street
312 N Spring Street, 10th Floor
Los Angeles, CA 90012

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

DESCRIPTION OF REPRESENTATION CASE PROCEDURES IN CERTIFICATION AND DECERTIFICATION CASES

The National Labor Relations Act grants employees the right to bargain collectively through representatives of their own choosing and to refrain from such activity. A party may file an RC, RD or RM petition with the National Labor Relations Board (NLRB) to conduct a secret ballot election to determine whether a representative will represent, or continue to represent, a unit of employees. An **RC** petition is generally filed by a union that desires to be certified as the bargaining representative. An **RD** petition is filed by employees who seek to remove the currently recognized union as the bargaining representative. An **RM** petition is filed by an employer who seeks an election because one or more individuals or unions have sought recognition as the bargaining representative, or based on a reasonable belief supported by objective considerations that the currently recognized union has lost its majority status. This form generally describes representation case procedures in RC, RD and RM cases, also referred to as certification and decertification cases.

Right to be Represented – Any party to a case with the NLRB has the right to be represented by an attorney or other representative in any proceeding before the NLRB. A party wishing to have a representative appear on its behalf should have the representative complete a Notice of Appearance (Form NLRB-4701), and E-File it at www.nlrb.gov or forward it to the NLRB Regional Office handling the petition as soon as possible.

Filing and Service of Petition – A party filing an RC, RD or RM petition is required to serve a copy of its petition on the parties named in the petition along with this form and the Statement of Position form. The petitioner files the petition with the NLRB, together with (1) a certificate showing service of these documents on the other parties named in the petition, and (2) a showing of interest to support the petition. The showing of interest is not served on the other parties.

Notice of Hearing – After a petition in a certification or decertification case is filed with the NLRB, the NLRB reviews the petition, certificate of service, and the required showing of interest for sufficiency, assigns the petition a case number, and promptly sends letters to the parties notifying them of the Board agent who will be handling the case. In most cases, the letters include a Notice of Representation Hearing. Except in cases presenting unusually complex issues, this pre-election hearing is set for a date 14 business days (excluding weekends and federal holidays) from the date of service of the notice of hearing. Once the hearing begins, it will continue day to day until completed absent extraordinary circumstances. The Notice of Representation Hearing also sets the due date for filing and serving the Statement(s) of Position and the Responsive Statement of Position(s). Included with the Notice of Representation Hearing are the following: (1) copy of the petition, (2) this form, (3) Statement of Position for non-petitioning parties, (4) petitioner's Responsive Statement of Position, (5) Notice of Petition for Election, and (6) letter advising how to contact the Board agent who will be handling the case and discussing those documents.

Hearing Postponement: Requests to postpone the hearing are not routinely granted, but the regional director may postpone the hearing for good cause. A party wishing to request a postponement should make the request in writing and set forth in detail the grounds for the request. The request should include the positions of the other parties regarding the postponement. The request must be filed electronically ("E-Filed") on the Agency's website (www.nlrb.gov) by following the instructions on the website. A copy of the request must be served simultaneously on all the other parties, and that fact must be noted in the request.

Statement of Position Form and List(s) of Employees – The Statement of Position form solicits commerce and other information that will facilitate entry into election agreements or streamline the pre-election hearing if the parties are unable to enter into an election agreement. In an **RC** or **RD** case, as part of its Statement of Position form, the employer also provides a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit. If the employer contends that the proposed unit is not appropriate, the employer must separately list the same information for all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit, and must further indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional

form for the list is provided on the NLRB website at www.nlrb.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx

Ordinarily the Statement of Position must be filed with the Regional Office and served on the other parties such that it is received by them by noon 8 business days from the issuance of the Notice of Hearing. The regional director may postpone the due date for filing and serving the Statement of Position for good cause. The Statement of Position form must be E-Filed but, unlike other E-Filed documents, will not be timely if filed on the due date but after noon in the time zone of the Region where the petition is filed. Consequences for failing to satisfy the Statement of Position requirement are discussed on the following page under the heading "Preclusion." A request to postpone the hearing will not automatically be treated as a request for an extension of the Statement of Position due date. If a party wishes to request both a postponement of the hearing and a postponement of the Statement of Position due date, the request must make that clear and must specify the reasons that postponements of both are sought.

Responsive Statement of Position – Petitioner's Responsive Statement(s) of Position solicits a response to the Statement(s) of Position filed by the other parties and further facilitates entry into election agreements or streamlines the preelection hearing. A petitioner must file a Responsive Statement of Position in response to each party's Statement of Position addressing each issue in each Statement of Position(s), if desired. In the case of an RM petition, the employer-petitioner must also provide commerce information and file and serve a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit. Ordinarily, the Responsive Statement of Position must be electronically filed with the Regional Office and served on the other parties such that it is received by noon 3 business days prior to the hearing. The regional director may postpone the due date for filing and serving the Responsive Statement of Position for good cause. The Responsive Statement of Position form must be E-Filed but, unlike other E-Filed documents, will not be timely if filed on the due date but after noon in the time zone of the Region where the petition is filed. Consequences for failing to satisfy the Responsive Statement of Position requirement are discussed on the following page under the heading "Preclusion." A request to postpone the hearing will not automatically be treated as a request for an extension of the Responsive Statement of Position due date. If a party wishes to request both a postponement of the hearing and a Postponement of the Responsive Statement of Position due date, the request must make that clear and must specify the reasons that postponements of both are sought.

Posting and Distribution of Notice of Petition for Election – Within 5 business days after service of the notice of hearing, the employer must post the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted, and must also distribute it electronically to the employees in the petitioned-for unit if the employer customarily communicates with these employees electronically. The employer must maintain the posting until the petition is dismissed or withdrawn, or the Notice of Petition for Election is replaced by the Notice of Election. The employer's failure properly to post or distribute the Notice of Petition for Election may be grounds for setting aside the election if proper and timely objections are filed.

Election Agreements – Elections can occur either by agreement of the parties or by direction of the regional director or the Board. Three types of agreements are available: (1) a Consent Election Agreement (Form NLRB-651); (2) a Stipulated Election Agreement (Form NLRB-652); and (3) a Full Consent Agreement (Form NLRB-5509). In the Consent Election Agreement and the Stipulated Election Agreement, the parties agree on an appropriate unit and the method, date, time, and place of a secret ballot election that will be conducted by an NLRB agent. In the Consent Agreement, the parties also agree that post-election matters (election objections or determinative challenged ballots) will be resolved with finality by the regional director; whereas in the Stipulated Election Agreement, the parties agree that they may request Board review of the regional director's post-election determinations. A Full Consent Agreement provides that the regional director will make final determinations regarding all pre-election and post-election issues.

Hearing Cancellation Based on Agreement of the Parties – The issuance of the Notice of Representation Hearing does not mean that the matter cannot be resolved by agreement of the parties. On the contrary, the NLRB encourages prompt voluntary adjustments and the Board agent assigned to the case will work with the parties to enter into an election agreement, so the parties can avoid the time and expense of participating in a hearing.

Hearing – A hearing will be held unless the parties enter into an election agreement approved by the regional director or the petition is dismissed or withdrawn.

***Purpose of Hearing*:** The primary purpose of a pre-election hearing is to determine if a question of representation exists. A question of representation exists if a proper petition has been filed concerning a unit

appropriate for the purpose of collective bargaining or, in the case of a decertification petition, concerning a unit in which a labor organization has been certified or is being currently recognized by the employer as the bargaining representative.

***Issues at Hearing*:** Issues that might be litigated at the pre-election hearing include: jurisdiction; labor organization status; bars to elections; unit appropriateness; expanding and contracting unit issues; inclusion of professional employees with nonprofessional employees; seasonal operation; potential mixed guard/non-guard unit; and eligibility formulas. At the hearing, the timely filed Statement of Position and Responsive Statement of Position(s) will be received into evidence. The hearing officer will not receive evidence concerning any issue as to which the parties have not taken adverse positions, except for evidence regarding the Board's jurisdiction over the employer and evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the regional director determines that record evidence is necessary.

***Preclusion*:** At the hearing, a party will be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or Responsive Statement of Position(s) or to place in dispute in timely response to another party's Statement of Position or response, except that no party will be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. As set forth in §102.66(d) of the Board's rules, if the employer fails to timely furnish the lists of employees, the employer will be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

***Conduct of Hearing*:** If held, the hearing is usually open to the public and will be conducted by a hearing officer of the NLRB. Any party has the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the existence of a question of representation. The hearing officer also has the power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence. Witnesses will be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Parties appearing at any hearing who have or whose witnesses have disabilities falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.503, and who in order to participate in this hearing need appropriate auxiliary aids, as defined in 29 C.F.R. 100.503, should notify the regional director as soon as possible and request the necessary assistance.

***Official Record*:** An official reporter will make the only official transcript of the proceedings and all citations in briefs or arguments must refer to the official record. (Copies of exhibits should be supplied to the hearing officer and other parties at the time the exhibit is offered in evidence.) All statements made at the hearing will be recorded by the official reporter while the hearing is on the record. If a party wishes to make off-the-record remarks, requests to make such remarks should be directed to the hearing officer and not to the official reporter. After the close of the hearing, any request for corrections to the record, either by stipulation or motion, should be forwarded to the regional director.

***Motions and Objections*:** All motions must be in writing unless stated orally on the record at the hearing and must briefly state the relief sought and the grounds for the motion. A copy of any motion must be served immediately on the other parties to the proceeding. Motions made during the hearing are filed with the hearing officer. All other motions are filed with the regional director, except that motions made after the transfer of the record to the Board are filed with the Board. If not E-Filed, an original and two copies of written motions shall be filed. Statements of reasons in support of motions or objections should be as concise as possible. Objections shall not be deemed waived by further participation in the hearing. On appropriate request, objections may be permitted to stand to an entire line of questioning. Automatic exceptions will be allowed to all adverse rulings.

***Election Details*:** Prior to the close of the hearing the hearing officer will: (1) solicit the parties' positions (but will not permit litigation) on the type, date(s), time(s), and location(s) of the election and the eligibility period; (2) solicit the name, address, email address, facsimile number, and phone number of the employer's on-site representative to whom the regional director should transmit the Notice of Election if an election is directed; (3) inform the parties that the regional director will issue a decision as soon as practicable and will immediately transmit the document to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided); and (4) inform the parties of their obligations if the director directs an election and of the time for complying with those obligations.

***Oral Argument and Briefs*:** Upon request, any party is entitled to a reasonable period at the close of the hearing for oral argument, which will be included in the official transcript of the hearing. At any time before the close of the hearing, any party may file a memorandum addressing relevant issues or points of law. Post-hearing briefs shall be due within 5 business days of the close of the hearing. The hearing officer may allow up to 10 additional business days for such briefs prior to the close of hearing and for good cause. If filed, copies of the memorandum or brief shall be served on all other parties to the proceeding and a statement of such service shall be filed with the memorandum or brief. No reply brief may be filed except upon special leave of the regional director. Briefs including electronic documents, filed with the Regional Director must be formatted as double-spaced in an 8½ by 11 inch format and must be e-filed through the Board's website, www.nlrb.gov.

Regional Director Decision - After the hearing, the regional director issues a decision directing an election, dismissing the petition or reopening the hearing. A request for review of the regional director's pre-election decision may be filed with the Board at any time after issuance of the decision until 10 business days after a final disposition of the proceeding by the regional director. Accordingly, a party need not file a request for review before the election in order to preserve its right to contest that decision after the election. Instead, a party can wait to see whether the election results have mooted the basis of an appeal. The Board will grant a request for review only where compelling reasons exist therefor.

Voter List – The employer must provide to the regional director and the parties named in the election agreement or direction of election a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular (''cell'') telephone numbers) of all eligible voters. (In construction industry elections, unless the parties stipulate to the contrary, also eligible to vote are all employees in the unit who either (1) were employed a total of 30 working days or more within the 12 months preceding the election eligibility date or (2) had some employment in the 12 months preceding the election eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date. However, employees meeting either of those criteria who were terminated for cause or who quit voluntarily prior to the completion of the last job for which they were employed, are not eligible.) The employer must also include in a separate section of the voter list the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge or those individuals who, according to the direction of election, will be permitted to vote subject to challenge. The list of names must be alphabetized (overall or by department) and be in the same Microsoft Word file (or Microsoft Word compatible file) format as the initial lists provided with the Statement of Position form unless the parties agree to a different format or the employer certifies that it does not possess the capacity to produce the list in the required form. When feasible, the list must be filed electronically with the regional director and served electronically on the other parties named in the agreement or direction. To be timely filed and served, the voter list must be received by the regional director and the parties named in the agreement or direction respectively within 2 business days after the approval of the agreement or issuance of the direction of elections unless a longer time is specified in the agreement or direction. A certificate of service on all parties must be filed with the regional director when the voter list is filed. The employer's failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper and timely objections are filed. The parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

Waiver of Time to Use Voter List – Under existing NLRB practice, an election is not ordinarily scheduled for a date earlier than 10 calendar days after the date when the employer must file the voter list with the Regional Office. However, the parties entitled to receive the voter list may waive all or part of the 10-day period by executing Form NLRB-4483. A waiver will not be effective unless all parties who are entitled to the list agree to waive the same number of days.

Election – Information about the election, requirements to post and distribute the Notice of Election, and possible proceedings after the election is available from the Regional Office and will be provided to the parties when the Notice of Election is sent to the parties.

Withdrawal or Dismissal – If it is determined that the NLRB does not have jurisdiction or that other criteria for proceeding to an election are not met, the petitioner is offered an opportunity to withdraw the petition. If the petitioner does not withdraw the petition, the regional director will dismiss the petition and advise the petitioner of the reason for the dismissal and of the right to appeal to the Board.

REVIEW THE FOLLOWING IMPORTANT INFORMATION BEFORE FILLING OUT A STATEMENT OF POSITION FORM

Completing and Filing this Form: The Notice of Hearing indicates which parties are responsible for completing the form. If you are required to complete the form, you must have it signed by an authorized representative and file a completed copy (including all attachments) with the RD and serve copies on all parties named in the petition by the date and time established for its submission. If more space is needed for your answers, additional pages may be attached. If you have questions about this form or would like assistance in filling out this form, please contact the Board agent assigned to handle this case. **You must EFile your Statement of Position at www.nlrb.gov, but unlike other e-Filed documents, it will *not* be timely if filed on the due date but after noon in the time zone of the Region where the petition was filed.**

> **Note:** ***Non-employer parties who complete this Statement of Position are NOT required to complete items 8f and 8g of the form, or to provide a commerce questionnaire or the lists described in item 7.***

Required Lists: The employer's Statement of Position must include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. If the employer contends that the proposed unit is inappropriate, the employer must separately list the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit to make it an appropriate unit. The employer must also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at **www.nlrb.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx**.

Consequences of Failure to Supply Information: Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations. Section 102.66(d) provides as follows:

> A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

FORM NLRB-505
(12-20)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

STATEMENT OF POSITION

DO NOT WRITE IN THIS SPACE	
Case No.	Date Filed
21-RC-289115	January 19, 2022

INSTRUCTIONS: *Submit this Statement of Position to an NLRB Office in the Region in which the petition was filed and serve it and all attachments on each party named in the petition in this case such that it is received by them by the date and time specified in the notice of hearing.*
Note: *Non-employer parties who complete this form are NOT required to complete items 8f or 8g below or to provide a commerce questionnaire or the lists described in item 7.*

1a. Full name of party filing Statement of Position	1c. Business Phone:	1e. Fax No.:
1b. Address *(Street and number, city, state, and ZIP code)*	1d. Cell No.:	1f. e-Mail Address

2. Do you agree that the NLRB has jurisdiction over the Employer in this case? [ ] Yes [ ] No
(A completed commerce questionnaire (Attachment A) must be submitted by the Employer, regardless of whether jurisdiction is admitted)

3. Do you agree that the proposed unit is appropriate? [ ] Yes [ ] No *(If not, answer 3a and 3b.)*

a. State the basis for your contention that the proposed unit is not appropriate. (*If you contend a classification should be excluded or included briefly explain why, such as shares a community of interest or are supervisors or guards.)*

b. State any classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit.

Added	Excluded

4. Other than the individuals in classifications listed in 3b, list any individual(s) whose eligibility to vote you intend to contest at the pre-election hearing in this case and the basis for contesting their eligibility.

5. Is there a bar to conducting an election in this case? [ ] Yes [ ] No *If yes, state the basis for your position.*

6. Describe all other issues you intend to raise at the pre-election hearing.

7. The employer must provide the following lists which must be alphabetized (overall or by department) in the format specified at **www.nlrb.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx**.
(a) A list containing the full names, work locations, shifts and job classification of all individuals in the proposed unit as of the payroll period immediately preceding the filing of the petition who remain employed as of the date of the filing of the petition. (Attachment B)
(b) If the employer contends that the proposed unit is inappropriate the employer must provide (1) a separate list containing the full names, work locations, shifts and job classifications of all individuals that it contends must be *added* to the proposed unit, if any to make it an appropriate unit, (Attachment C) and (2) a list containing the full names of any individuals it contends must be *excluded* from the proposed unit to make it an appropriate unit. (Attachment D)

8a. State your position with respect to the details of any election that may be conducted in this matter. Type: [ ] Manual [ ] Mail [ ] Mixed Manual/Mail

8b. Date(s)	8c. Time(s)	8d. Location(s)
8e. Eligibility Period (e.g. special eligibility formula)	8f. Last Payroll Period Ending Date	8g. Length of payroll period [ ] Weekly [ ]Biweekly [ ] Other *(specify length)*

9. Representative who will accept service of all papers for purposes of the representation proceeding

9a. Full name and title of authorized representative	9b. Signature of authorized representative	9c. Date
9d. Address *(Street and number, city, state, and ZIP code)*		9e. e-Mail Address
9f. Business Phone No.:	9g. Fax No.	9h. Cell No.

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. Section 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation proceedings. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. 74942-43 (December 13, 2006). The NLRB will further explain these uses upon request. Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations and may cause the NLRB to refuse to further process a representation case or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

FORM NLRB-5081
(3-11)

NATIONAL LABOR RELATIONS BOARD

QUESTIONNAIRE ON COMMERCE INFORMATION

Please read carefully, answer all applicable items, and return to the NLRB Office. If additional space is required, please add a page and identify item number.

CASE NAME	**CASE NUMBER** 21-RC-289115

1. EXACT LEGAL TITLE OF ENTITY (As filed with State and/or stated in legal documents forming entity)

2. TYPE OF ENTITY

[ ] CORPORATION [ ] LLC [ ] LLP [ ] PARTNERSHIP [ ] SOLE PROPRIETORSHIP [ ] OTHER (Specify)

3. IF A CORPORATION or LLC

A. STATE OF INCORPORATION OR FORMATION	B. NAME, ADDRESS, AND RELATIONSHIP (e.g. parent, subsidiary) OF ALL RELATED ENTITIES

4. IF AN LLC OR ANY TYPE OF PARTNERSHIP, FULL NAME AND ADDRESS OF ALL MEMBERS OR PARTNERS

5. IF A SOLE PROPRIETORSHIP, FULL NAME AND ADDRESS OF PROPRIETOR

6. BRIEFLY DESCRIBE THE NATURE OF YOUR OPERATIONS *(Products handled or manufactured, or nature of services performed).*

7A. PRINCIPAL LOCATION:	**7B. BRANCH LOCATIONS:**

8. NUMBER OF PEOPLE PRESENTLY EMPLOYED

A. TOTAL:	B. AT THE ADDRESS INVOLVED IN THIS MATTER:

9. DURING THE MOST RECENT ***(Check the appropriate box):*** **[ ] CALENDAR [ ] 12 MONTHS or [ ] FISCAL YEAR** ***(FY DATES _____)***

	YES	**NO**
A. Did you **provide services** valued in excess of $50,000 directly to customers outside your State? If no, indicate actual value. $_____		
B. If you answered no to 9A, did you **provide services** valued in excess of $50,000 to customers in your State who purchased goods valued in excess of $50,000 from directly outside your State? If no, indicate the value of any such services you provided. $_____		
C. If you answered no to 9A and 9B, did you **provide services** valued in excess of $50,000 to public utilities, transit systems, newspapers, health care institutions, broadcasting stations, commercial buildings, educational institutions, or retail concerns? If less than $50,000, indicate amount. $_____		
D. Did you **sell goods** valued in excess of $50,000 directly to customers located outside your State? If less than $50,000, indicate amount. $_____		
E. If you answered no to 9D, did you **sell goods** valued in excess of $50,000 directly to customers located inside your State who purchased other goods valued in excess of $50,000 from directly outside your State? If less than $50,000, indicate amount. $_____		
F. Did you **purchase and receive goods** valued in excess of $50,000 from directly outside your State? If less than $50,000, indicate amount. $_____		
G. Did you **purchase and receive goods** valued in excess of $50,000 from enterprises who received the goods directly from points outside your State? If less than $50,000, indicate amount. $_____		
H. **Gross Revenues** from all sales or performance of services ***(Check the largest amount)***: [ ] $100,000 [ ] $250,000 [ ] $500,000 [ ] $1,000,000 or more If less than $100,000, indicate amount.		
I. **Did you begin operations within the last 12 months?** If yes, specify date: _____		

10. ARE YOU A MEMBER OF AN ASSOCIATION OR OTHER EMPLOYER GROUP THAT ENGAGES IN COLLECTIVE BARGAINING?

[ ] YES [ ] NO *(If yes, name and address of association or group).*

11. REPRESENTATIVE BEST QUALIFIED TO GIVE FURTHER INFORMATION ABOUT YOUR OPERATIONS

NAME	TITLE	E-MAIL ADDRESS	TEL. NUMBER

12. AUTHORIZED REPRESENTATIVE COMPLETING THIS QUESTIONNAIRE

NAME AND TITLE *(Type or Print)*	SIGNATURE	E-MAIL ADDRESS	DATE

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary. However, failure to supply the information may cause the NLRB to refuse to process any further a representation or unfair labor practice case, or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

REVIEW THE FOLLOWING IMPORTANT INFORMATION BEFORE FILLING OUT A RESPONSIVE STATEMENT OF POSITION FORM

Completing and Filing this Form: For **RC and RD petitions**, the Petitioner is required to complete this form in response to each timely filed and served Statement of Position filed by another party. For **RM petitions**, the Employer-Petitioner must complete a Responsive Statement of Position form and submit the list described below. In accordance with Section 102.63(b) of the Board's Rules, if you are required to complete the form, you must have it signed by an authorized representative, and file a completed copy with any necessary attachments, with this office and serve it on all parties named in the petition responding to the issues raised in another party's Statement of Position, such that it is received no later than noon three business days before the date of the hearing. A separate form must be completed for each timely filed and properly served Statement of Position you receive. If more space is needed for your answers, additional pages may be attached. If you have questions about this form or would like assistance in filling out this form, please contact the Board agent assigned to handle this case. **You must E-File your Responsive Statement of Position at www.NLRB.gov, but unlike other e-Filed documents, it will *not* be timely if filed on the due date but after noon in the time zone of the Region where the petition was filed. Note that if you are completing this form as a PDF downloaded from www.NLRB.gov, the form will lock upon signature and no further editing may be made.**

Required List: In addition to responding to the issues raised in another party's Statement of Position, if any, the Employer-Petitioner in an RM case is required to file and serve on the parties a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. This list must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the list in the required form, the list must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx

Consequences of Failure to Submit a Responsive Statement of Position: Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations. Section 102.66(d) provides as follows:

> A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

FORM NLRB-506
(12-20)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

RESPONSIVE STATEMENT OF POSITION – RC, RD or RM PETITION

DO NOT WRITE IN THIS SPACE	
Case No.	Date Filed
21-RC-289115	January 19, 2022

INSTRUCTIONS: *If a party has submitted and served on you a timely Statement of Position to an RC, RD or RM petition, the Petitioner must submit this Responsive Statement of Position to an NLRB Office in the Region in which the petition was filed and serve it and any attachments on each party named in the petition in this case such that it is received by noon local time, three business days prior to the hearing date specified in the Notice of Hearing. A separate form must be completed for each timely filed and properly served Statement of Position received by the Petitioner. The Petitioner-Employer in a RM case is required to file this Responsive Statement of Position and include an appropriate employee list without regard to whether another party has filed a Statement of Position.*

This Responsive Statement of Position is filed by the Petitioner in response to a Statement of Position received from the following party:

The Employer	**An Intervenor/Union**

1a. Full Name of Party Filing Responsive Statement of Position

1c. Business Phone	1d. Cell No.	1e. Fax No.	1f. E-Mail Address

1b. Address (Street and Number, City, State, and ZIP Code)

2. Identify all issues raised in the other party's Statement of Position that you dispute and describe the basis of your dispute:

a. EMPLOYER NAME/IDENTITY [Box 1a of Statement of Position Form NLRB-505 and Questionnaire on Commerce Information]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

b. JURISDICTION [Box 2 of Statement of Position Form NLRB-505 and Questionnaire on Commerce Information]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

c. APPROPRIATENESS OF UNIT [Boxes 3, 3a and 3b of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

d. INDIVIDUAL ELIGIBILITY [Box 4 of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

e. BARS TO ELECTION [Box 5 of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

f. ALL OTHER ISSUES [Box 6 of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

g. ELECTION DETAILS [Boxes 8a, 8b, 8c, 8d, 8e, 8f, and 8g of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

Full Name and Title of Authorized Representative	Signature of Authorized Representative	Date

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001) PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. Section 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation proceedings. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. 74942-43 (December 13, 2006). The NLRB will further explain these uses upon request. Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations and may cause the NLRB to refuse to further process a representation case or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

Please fill all necessary fields on the form PRIOR to digitally signing. To make changes after the form has been signed, right-click on the signature field and click "clear signature." Once complete, please sign the form.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 21
US Court House, Spring Street
312 N Spring Street, 10th Floor
Los Angeles, CA 90012

Agency Website: www.nlrb.gov
Telephone: (213)894-5200
Fax: (213)894-2778

Download
NLRB
Mobile App

January 19, 2022

URGENT

Teamsters Local 848
3888 Cherry Avenue
Long Beach, CA 90807

Teamsters Local 542
4666 Mission Gorge Place
San Diego, CA 92120-4150

Re: XPO Logistics Cartage, LLC dba XPO Logistics
Case 21-RC-289115

Dear Sir or Madam:

The enclosed petition that you filed with the National Labor Relations Board (NLRB) has been assigned the above case number. This letter tells you how to contact the Board agent who will be handling this matter; explains your obligation to provide the originals of the showing of interest and the requirement that you complete and serve a Responsive Statement of Position form in response to each timely filed and served Statement(s) of Position; notifies you of a hearing; describes the employer's obligation to post and distribute a Notice of Petition for Election, complete a Statement of Position and provide a voter list; requests that you provide certain information; notifies you of your right to be represented; and discusses some of our procedures including how to submit documents to the NLRB.

Investigator: This petition will be investigated by Field Attorney STEPHEN SIMMONS whose telephone number is (213)634-6509. The Board agent will contact you shortly to discuss processing the petition. If you have any questions, please do not hesitate to call the Board agent. The Board agent may also contact you and the other party or parties to schedule a conference meeting or telephonic or video conference for some time before the close of business the day following receipt of the final Responsive Statement(s) of Position. This will give the parties sufficient time to determine if any issues can be resolved prior to hearing or if a hearing is necessary. If the agent is not available, you may contact Assistant to the Regional Director NATHAN M. SEIDMAN whose telephone number is (213)634-6518. If appropriate, the NLRB attempts to schedule an election either by agreement of the parties or by holding a hearing and then directing an election.

Showing of Interest: If the Showing of Interest you provided in support of your petition was submitted electronically or by fax, the original documents which constitute the Showing of Interest containing handwritten signatures must be delivered to the Regional office within **2**

business days. If the originals are not received within that time the Region will dismiss your petition.

Notice of Hearing: Enclosed is a Notice of Representation Hearing to be conducted at **9:00 AM** on **Tuesday, February 8, 2022 via videoconference**, if the parties do not voluntarily agree to an election. If a hearing is necessary, the hearing will run on consecutive days until concluded unless the regional director concludes that extraordinary circumstances warrant otherwise. Before the hearing begins, we will continue to explore potential areas of agreement with the parties in order to reach an election agreement and to eliminate or limit the costs associated with formal hearings.

Upon request of a party showing good cause, the regional director may postpone the hearing. A party desiring a postponement should make the request to the regional director in writing, set forth in detail the grounds for the request, and include the positions of the other parties regarding the postponement. E-Filing the request is required. A copy of the request must be served simultaneously on all the other parties, and that fact must be noted in the request.

Posting and Distribution of Notice: The Employer must post the enclosed Notice of Petition for Election by January 26, 2022 in conspicuous places, including all places where notices to employees are customarily posted. If it customarily communicates electronically with its employees in the petitioned-for unit, it must also distribute the notice electronically to them. The Employer must maintain the posting until the petition is dismissed or withdrawn or this notice is replaced by the Notice of Election. Failure to post or distribute the notice may be grounds for setting aside the election if proper and timely objections are filed.

Statement of Position: In accordance with Section 102.63(b) of the Board's Rules, the Employer is required to complete the enclosed Statement of Position form, have it signed by an authorized representative, and file a completed copy with any necessary attachments, with this office and serve it on all parties named in the petition by **noon Pacific Time** on **January 31, 2022.** The Statement of Position must include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. If the Employer contends that the proposed unit is inappropriate, it must separately list the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit to make it an appropriate unit. The Employer must also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit.

Required Responsive Statement of Position (RSOP): In accordance with Section 102.63(b) of the Board's Rules, following timely filing and service of a Statement of Position, the petitioner is required to complete the enclosed Responsive Statement of Position form addressing issues raised in any Statement(s) of Position. The petitioner must file a complete, signed RSOP in response to all other parties' timely filed and served Statement of Position, with all required attachments, with this office and serve it on all parties named in the petition such that it is received by them by **noon Pacific Time** on **February 3, 2022.** This form solicits information that will facilitate entry into election agreements or streamline the pre-election hearing if the parties are

unable to enter into an election agreement. **This form must be e-Filed, but unlike other e-Filed documents, will not be timely if filed on the due date but after noon Pacific Time.** If you have questions about this form or would like assistance in filling out this form, please contact the Board agent named above.

Failure to Supply Information: Failure to supply the information requested by the RSOP form may preclude you from litigating issues under Section 102.66(d) of the Board's Rules and Regulations. Section 102.66(d) provides as follows:

> A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§ 102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

Voter List: If an election is held in this matter, the Employer must transmit to this office and to the other parties to the election, an alphabetized list of the full names and addresses of all eligible voters, including their shifts, job classifications, work locations, and other contact information including available personal email addresses and available personal home and cellular telephone numbers. Usually, the list must be furnished within 2 business days of the issuance of the Decision and Direction of Election or approval of an election agreement. The list must be electronically filed with the Region and served electronically on the other parties. To guard against potential abuse, this list may not be used for purposes other than the representation proceeding, NLRB proceedings arising from it or other related matters.

Under existing NLRB practice, an election is not ordinarily scheduled for a date earlier than 10 days after the date when the Employer must file the voter list with the Regional Office. However, a petitioner and/or union entitled to receive the voter list may waive all or part of the 10-day period by executing Form NLRB-4483, which is available on the NLRB's website or from an

NLRB office. A waiver will not be effective unless all parties who are entitled to the voter list agree to waive the same number of days.

Information Needed Now: Please submit to this office, as soon as possible, the following information needed to handle this matter:

(a) The correct name of the Union as stated in its constitution or bylaws.

(b) A copy of any existing or recently expired collective-bargaining agreements, and any amendments or extensions, or any recognition agreements covering any employees in the petitioned-for unit.

(c) If potential voters will need notices or ballots translated into a language other than English, the names of those languages and dialects, if any.

(d) The name and contact information for any other labor organization (union) claiming to represent or have an interest in any of the employees in the petitioned-for unit and for any employer who may be a joint employer of the employees in the proposed unit. Failure to disclose the existence of an interested party may delay the processing of the petition.

Right to Representation: You have the right to be represented by an attorney or other representative in any proceeding before the NLRB. In view of our policy of processing these cases expeditiously, if you wish to be represented, you should obtain representation promptly. Your representative must notify us in writing of this fact as soon as possible by completing Form NLRB-4701, Notice of Appearance. This form is available on our website, www.nlrb.gov, or from an NLRB office upon your request.

If someone contacts you about representing you in this case, please be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the NLRB. Their knowledge regarding this matter was obtained only through access to information that must be made available to any member of the public under the Freedom of Information Act.

Procedures: Pursuant to Section 102.5 of the Board's Rules and Regulations, parties must submit all documentary evidence, including statements of position, exhibits, sworn statements, and/or other evidence, by electronically submitting (E-Filing) them through the Agency's web site (www.nlrb.gov). You must e-file all documents electronically or provide a written statement explaining why electronic submission is not possible or feasible. Failure to comply with Section 102.5 will result in rejection of your submission. The Region will make its determinations solely based on the documents and evidence properly submitted. All evidence submitted electronically should be in the form in which it is normally used and maintained in the course of business (i.e., native format). Where evidence submitted electronically is not in native format, it should be submitted in a manner that retains the essential functionality of the native format (i.e., in a machine-readable and searchable electronic format). If you have questions about the submission of evidence or expect to deliver a large quantity of electronic records, please promptly contact the Board agent investigating the petition.

Information about the NLRB and our customer service standards is available on our website, www.nlrb.gov, or from an NLRB office upon your request. We can provide assistance for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,

William B. Cowen
Regional Director

Enclosures

1. Petition
2. Notice of Petition for Election (Form 5492)
3. Notice of Representation Hearing
4. Description of Procedures in Certification and Decertification Cases (Form 4812)
5. Statement of Position form and Commerce Questionnaire (Form 505)
6. Responsive Statement of Position (Form 506)

cc: Julie Gutman Dickinson, Attorney at Law
Bush Gottlieb, A Law Corporation
801 North Brand Blvd Ste 950
Glendale, CA 91203-1260

WBC/js

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

XPO LOGISTICS CARTAGE, LLC DBA XPO LOGISTICS **Employer** **and** **TEAMSTERS LOCAL 848, TEAMSTERS LOCAL 542** **Petitioner**	**Case 21-RC-289115**

NOTICE OF REPRESENTATION HEARING

The Petitioner filed the attached petition pursuant to Section 9(c) of the National Labor Relations Act. It appears that a question affecting commerce exists as to whether the employees in the unit described in the petition wish to be represented by a collective-bargaining representative as defined in Section 9(a) of the Act.

YOU ARE HEREBY NOTIFIED that, pursuant to Sections 3(b) and 9(c) of the Act, at 9:00 AM on **Tuesday, February 8, 2022** and on consecutive days thereafter until concluded, via videoconference, a hearing will be conducted before a hearing officer of the National Labor Relations Board. At the hearing, the parties will have the right to appear via videoconference, and give testimony.

YOU ARE FURTHER NOTIFIED that, pursuant to Section 102.63(b) of the Board's Rules and Regulations, XPO Logistics Cartage, LLC dba XPO Logistics must complete the Statement of Position and file it and all attachments with the Regional Director and serve it on the parties listed on the petition such that is received by them by no later than **noon** Pacific time on January 31, 2022**.** Following timely filing and service of a Statement of Position by XPO Logistics Cartage, LLC dba XPO Logistics, the Petitioner must complete its Responsive Statement of Position(s) responding to the issues raised in the Employer's and/or Union's Statement of Position and file them and all attachments with the Regional Director and serve them on the parties named in the petition such they are received by them no later than **noon** Pacific on February 03, 2022.

Pursuant to Section 102.5 of the Board's Rules and Regulations, all documents filed in cases before the Agency must be filed by electronically submitting (E-Filing) through the Agency's website (www.nlrb.gov), unless the party filing the document does not have access to the means for filing electronically or filing electronically would impose an undue burden. Documents filed by means other than E-Filing must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Detailed instructions for using the NLRB's E-Filing system can be found in the E-Filing System User Guide

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

DESCRIPTION OF REPRESENTATION CASE PROCEDURES IN CERTIFICATION AND DECERTIFICATION CASES

The National Labor Relations Act grants employees the right to bargain collectively through representatives of their own choosing and to refrain from such activity. A party may file an RC, RD or RM petition with the National Labor Relations Board (NLRB) to conduct a secret ballot election to determine whether a representative will represent, or continue to represent, a unit of employees. An **RC** petition is generally filed by a union that desires to be certified as the bargaining representative. An **RD** petition is filed by employees who seek to remove the currently recognized union as the bargaining representative. An **RM** petition is filed by an employer who seeks an election because one or more individuals or unions have sought recognition as the bargaining representative, or based on a reasonable belief supported by objective considerations that the currently recognized union has lost its majority status. This form generally describes representation case procedures in RC, RD and RM cases, also referred to as certification and decertification cases.

Right to be Represented – Any party to a case with the NLRB has the right to be represented by an attorney or other representative in any proceeding before the NLRB. A party wishing to have a representative appear on its behalf should have the representative complete a Notice of Appearance (Form NLRB-4701), and E-File it at www.nlrb.gov or forward it to the NLRB Regional Office handling the petition as soon as possible.

Filing and Service of Petition – A party filing an RC, RD or RM petition is required to serve a copy of its petition on the parties named in the petition along with this form and the Statement of Position form. The petitioner files the petition with the NLRB, together with (1) a certificate showing service of these documents on the other parties named in the petition, and (2) a showing of interest to support the petition. The showing of interest is not served on the other parties.

Notice of Hearing – After a petition in a certification or decertification case is filed with the NLRB, the NLRB reviews the petition, certificate of service, and the required showing of interest for sufficiency, assigns the petition a case number, and promptly sends letters to the parties notifying them of the Board agent who will be handling the case. In most cases, the letters include a Notice of Representation Hearing. Except in cases presenting unusually complex issues, this pre-election hearing is set for a date 14 business days (excluding weekends and federal holidays) from the date of service of the notice of hearing. Once the hearing begins, it will continue day to day until completed absent extraordinary circumstances. The Notice of Representation Hearing also sets the due date for filing and serving the Statement(s) of Position and the Responsive Statement of Position(s). Included with the Notice of Representation Hearing are the following: (1) copy of the petition, (2) this form, (3) Statement of Position for non-petitioning parties, (4) petitioner's Responsive Statement of Position, (5) Notice of Petition for Election, and (6) letter advising how to contact the Board agent who will be handling the case and discussing those documents.

Hearing Postponement: Requests to postpone the hearing are not routinely granted, but the regional director may postpone the hearing for good cause. A party wishing to request a postponement should make the request in writing and set forth in detail the grounds for the request. The request should include the positions of the other parties regarding the postponement. The request must be filed electronically ("E-Filed") on the Agency's website (www.nlrb.gov) by following the instructions on the website. A copy of the request must be served simultaneously on all the other parties, and that fact must be noted in the request.

Statement of Position Form and List(s) of Employees – The Statement of Position form solicits commerce and other information that will facilitate entry into election agreements or streamline the pre-election hearing if the parties are unable to enter into an election agreement. In an **RC** or **RD** case, as part of its Statement of Position form, the employer also provides a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit. If the employer contends that the proposed unit is not appropriate, the employer must separately list the same information for all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit, and must further indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional

form for the list is provided on the NLRB website at www.nlrb.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx

Ordinarily the Statement of Position must be filed with the Regional Office and served on the other parties such that it is received by them by noon 8 business days from the issuance of the Notice of Hearing. The regional director may postpone the due date for filing and serving the Statement of Position for good cause. The Statement of Position form must be E-Filed but, unlike other E-Filed documents, will not be timely if filed on the due date but after noon in the time zone of the Region where the petition is filed. Consequences for failing to satisfy the Statement of Position requirement are discussed on the following page under the heading "Preclusion." A request to postpone the hearing will not automatically be treated as a request for an extension of the Statement of Position due date. If a party wishes to request both a postponement of the hearing and a postponement of the Statement of Position due date, the request must make that clear and must specify the reasons that postponements of both are sought.

Responsive Statement of Position – Petitioner's Responsive Statement(s) of Position solicits a response to the Statement(s) of Position filed by the other parties and further facilitates entry into election agreements or streamlines the preelection hearing. A petitioner must file a Responsive Statement of Position in response to each party's Statement of Position addressing each issue in each Statement of Position(s), if desired. In the case of an RM petition, the employer-petitioner must also provide commerce information and file and serve a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit. Ordinarily, the Responsive Statement of Position must be electronically filed with the Regional Office and served on the other parties such that it is received by noon 3 business days prior to the hearing. The regional director may postpone the due date for filing and serving the Responsive Statement of Position for good cause. The Responsive Statement of Position form must be E-Filed but, unlike other E-Filed documents, will not be timely if filed on the due date but after noon in the time zone of the Region where the petition is filed. Consequences for failing to satisfy the Responsive Statement of Position requirement are discussed on the following page under the heading "Preclusion." A request to postpone the hearing will not automatically be treated as a request for an extension of the Responsive Statement of Position due date. If a party wishes to request both a postponement of the hearing and a Postponement of the Responsive Statement of Position due date, the request must make that clear and must specify the reasons that postponements of both are sought.

Posting and Distribution of Notice of Petition for Election – Within 5 business days after service of the notice of hearing, the employer must post the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted, and must also distribute it electronically to the employees in the petitioned-for unit if the employer customarily communicates with these employees electronically. The employer must maintain the posting until the petition is dismissed or withdrawn, or the Notice of Petition for Election is replaced by the Notice of Election. The employer's failure properly to post or distribute the Notice of Petition for Election may be grounds for setting aside the election if proper and timely objections are filed.

Election Agreements – Elections can occur either by agreement of the parties or by direction of the regional director or the Board. Three types of agreements are available: (1) a Consent Election Agreement (Form NLRB-651); (2) a Stipulated Election Agreement (Form NLRB-652); and (3) a Full Consent Agreement (Form NLRB-5509). In the Consent Election Agreement and the Stipulated Election Agreement, the parties agree on an appropriate unit and the method, date, time, and place of a secret ballot election that will be conducted by an NLRB agent. In the Consent Agreement, the parties also agree that post-election matters (election objections or determinative challenged ballots) will be resolved with finality by the regional director; whereas in the Stipulated Election Agreement, the parties agree that they may request Board review of the regional director's post-election determinations. A Full Consent Agreement provides that the regional director will make final determinations regarding all pre-election and post-election issues.

Hearing Cancellation Based on Agreement of the Parties – The issuance of the Notice of Representation Hearing does not mean that the matter cannot be resolved by agreement of the parties. On the contrary, the NLRB encourages prompt voluntary adjustments and the Board agent assigned to the case will work with the parties to enter into an election agreement, so the parties can avoid the time and expense of participating in a hearing.

Hearing – A hearing will be held unless the parties enter into an election agreement approved by the regional director or the petition is dismissed or withdrawn.

***Purpose of Hearing*:** The primary purpose of a pre-election hearing is to determine if a question of representation exists. A question of representation exists if a proper petition has been filed concerning a unit

appropriate for the purpose of collective bargaining or, in the case of a decertification petition, concerning a unit in which a labor organization has been certified or is being currently recognized by the employer as the bargaining representative.

***Issues at Hearing*:** Issues that might be litigated at the pre-election hearing include: jurisdiction; labor organization status; bars to elections; unit appropriateness; expanding and contracting unit issues; inclusion of professional employees with nonprofessional employees; seasonal operation; potential mixed guard/non-guard unit; and eligibility formulas. At the hearing, the timely filed Statement of Position and Responsive Statement of Position(s) will be received into evidence. The hearing officer will not receive evidence concerning any issue as to which the parties have not taken adverse positions, except for evidence regarding the Board's jurisdiction over the employer and evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the regional director determines that record evidence is necessary.

***Preclusion*:** At the hearing, a party will be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or Responsive Statement of Position(s) or to place in dispute in timely response to another party's Statement of Position or response, except that no party will be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. As set forth in §102.66(d) of the Board's rules, if the employer fails to timely furnish the lists of employees, the employer will be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

***Conduct of Hearing*:** If held, the hearing is usually open to the public and will be conducted by a hearing officer of the NLRB. Any party has the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the existence of a question of representation. The hearing officer also has the power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence. Witnesses will be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Parties appearing at any hearing who have or whose witnesses have disabilities falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.503, and who in order to participate in this hearing need appropriate auxiliary aids, as defined in 29 C.F.R. 100.503, should notify the regional director as soon as possible and request the necessary assistance.

***Official Record*:** An official reporter will make the only official transcript of the proceedings and all citations in briefs or arguments must refer to the official record. (Copies of exhibits should be supplied to the hearing officer and other parties at the time the exhibit is offered in evidence.) All statements made at the hearing will be recorded by the official reporter while the hearing is on the record. If a party wishes to make off-the-record remarks, requests to make such remarks should be directed to the hearing officer and not to the official reporter. After the close of the hearing, any request for corrections to the record, either by stipulation or motion, should be forwarded to the regional director.

***Motions and Objections*:** All motions must be in writing unless stated orally on the record at the hearing and must briefly state the relief sought and the grounds for the motion. A copy of any motion must be served immediately on the other parties to the proceeding. Motions made during the hearing are filed with the hearing officer. All other motions are filed with the regional director, except that motions made after the transfer of the record to the Board are filed with the Board. If not E-Filed, an original and two copies of written motions shall be filed. Statements of reasons in support of motions or objections should be as concise as possible. Objections shall not be deemed waived by further participation in the hearing. On appropriate request, objections may be permitted to stand to an entire line of questioning. Automatic exceptions will be allowed to all adverse rulings.

***Election Details*:** Prior to the close of the hearing the hearing officer will: (1) solicit the parties' positions (but will not permit litigation) on the type, date(s), time(s), and location(s) of the election and the eligibility period; (2) solicit the name, address, email address, facsimile number, and phone number of the employer's on-site representative to whom the regional director should transmit the Notice of Election if an election is directed; (3) inform the parties that the regional director will issue a decision as soon as practicable and will immediately transmit the document to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided); and (4) inform the parties of their obligations if the director directs an election and of the time for complying with those obligations.

***Oral Argument and Briefs*:** Upon request, any party is entitled to a reasonable period at the close of the hearing for oral argument, which will be included in the official transcript of the hearing. At any time before the close of the hearing, any party may file a memorandum addressing relevant issues or points of law. Post-hearing briefs shall be due within 5 business days of the close of the hearing. The hearing officer may allow up to 10 additional business days for such briefs prior to the close of hearing and for good cause. If filed, copies of the memorandum or brief shall be served on all other parties to the proceeding and a statement of such service shall be filed with the memorandum or brief. No reply brief may be filed except upon special leave of the regional director. Briefs including electronic documents, filed with the Regional Director must be formatted as double-spaced in an 8½ by 11 inch format and must be e-filed through the Board's website, www.nlrb.gov.

Regional Director Decision - After the hearing, the regional director issues a decision directing an election, dismissing the petition or reopening the hearing. A request for review of the regional director's pre-election decision may be filed with the Board at any time after issuance of the decision until 10 business days after a final disposition of the proceeding by the regional director. Accordingly, a party need not file a request for review before the election in order to preserve its right to contest that decision after the election. Instead, a party can wait to see whether the election results have mooted the basis of an appeal. The Board will grant a request for review only where compelling reasons exist therefor.

Voter List – The employer must provide to the regional director and the parties named in the election agreement or direction of election a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular (''cell'') telephone numbers) of all eligible voters. (In construction industry elections, unless the parties stipulate to the contrary, also eligible to vote are all employees in the unit who either (1) were employed a total of 30 working days or more within the 12 months preceding the election eligibility date or (2) had some employment in the 12 months preceding the election eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date. However, employees meeting either of those criteria who were terminated for cause or who quit voluntarily prior to the completion of the last job for which they were employed, are not eligible.) The employer must also include in a separate section of the voter list the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge or those individuals who, according to the direction of election, will be permitted to vote subject to challenge. The list of names must be alphabetized (overall or by department) and be in the same Microsoft Word file (or Microsoft Word compatible file) format as the initial lists provided with the Statement of Position form unless the parties agree to a different format or the employer certifies that it does not possess the capacity to produce the list in the required form. When feasible, the list must be filed electronically with the regional director and served electronically on the other parties named in the agreement or direction. To be timely filed and served, the voter list must be received by the regional director and the parties named in the agreement or direction respectively within 2 business days after the approval of the agreement or issuance of the direction of elections unless a longer time is specified in the agreement or direction. A certificate of service on all parties must be filed with the regional director when the voter list is filed. The employer's failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper and timely objections are filed. The parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

Waiver of Time to Use Voter List – Under existing NLRB practice, an election is not ordinarily scheduled for a date earlier than 10 calendar days after the date when the employer must file the voter list with the Regional Office. However, the parties entitled to receive the voter list may waive all or part of the 10-day period by executing Form NLRB-4483. A waiver will not be effective unless all parties who are entitled to the list agree to waive the same number of days.

Election – Information about the election, requirements to post and distribute the Notice of Election, and possible proceedings after the election is available from the Regional Office and will be provided to the parties when the Notice of Election is sent to the parties.

Withdrawal or Dismissal – If it is determined that the NLRB does not have jurisdiction or that other criteria for proceeding to an election are not met, the petitioner is offered an opportunity to withdraw the petition. If the petitioner does not withdraw the petition, the regional director will dismiss the petition and advise the petitioner of the reason for the dismissal and of the right to appeal to the Board.

FORM NLRB-4701
(9-03)

NATIONAL LABOR RELATIONS BOARD

NOTICE OF APPEARANCE

XPO Logistics Cartage, LLC dba XPO Logistics

and

TEAMSTERS LOCAL 542

CASE 21-RC-289115

XPO Logistics Cartage, LLC dba XPO Logistics

☒ **REGIONAL DIRECTOR**

☐ **EXECUTIVE SECRETARY**
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

☐ **GENERAL COUNSEL**
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

THE UNDERSIGNED HEREBY ENTERS APPEARANCE AS REPRESENTATIVE OF
XPO Logistics Cartage, LLC dba XPO Logistics

IN THE ABOVE-CAPTIONED MATTER.

CHECK THE APPROPRIATE BOX(ES) BELOW:

☒ **REPRESENTATIVE IS AN ATTORNEY**

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(REPRESENTATIVE INFORMATION)

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SIGNATURE: _____
(Please sign in ink.)

DATE: Thursday, January 20, 2022 7:22 AM Pacific Standard Time

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FORM NLRB-4701
(9-03)

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DATE: Thursday, January 20, 2022 8:10 AM Pacific Standard Time

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FORM NLRB-4701
(9-03)

NATIONAL LABOR RELATIONS BOARD

NOTICE OF APPEARANCE

Teamsters Local 848

and

XPO Logistics Cartage, LLC dba XPO Logistics

CASE 21-RC-289115

☒ **REGIONAL DIRECTOR**

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Washington, DC 20570

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Washington, DC 20570

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(REPRESENTATIVE INFORMATION)

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SIGNATURE: Jeffrey Berman

(Please sign in ink.)

DATE: January 20, 2022

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(REPRESENTATIVE INFORMATION)

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SIGNATURE: Thomas J. Posey

(Please sign in ink.)

DATE: _____

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Teamsters Local 848

and

XPO Logistics Cartage, LLC dba XPO Logistics

CASE 21-RC-289115

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NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

☐ **GENERAL COUNSEL**
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

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XPO Logistics Cartage, LLC dba XPO Logistics

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(Please sign in ink.)

DATE: January 20, 2022

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(9-03)

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NOTICE OF APPEARANCE

XPO Logistics Cartage, LLC dba XPO Logistics

and

CASE 21-RC-289115

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NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

☐ **GENERAL COUNSEL**
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

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(REPRESENTATIVE INFORMATION)

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CELL PHONE NUMBER: _____ *FAX:* _____

SIGNATURE: Howard M Wexler
(Please sign in ink.)

DATE: 1/21/2022

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FORM NLRB-4701
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NATIONAL LABOR RELATIONS BOARD

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Teamsters Local 848

and

XPO Logistics Cartage, LLC dba XPO Logistics

CASE 21-RC-289115

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NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

☐ **GENERAL COUNSEL**
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

THE UNDERSIGNED HEREBY ENTERS APPEARANCE AS REPRESENTATIVE OF _____

Teamsters Local 848

_____

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(REPRESENTATIVE INFORMATION)

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SIGNATURE: _____
(Please sign in ink.)

DATE: 1/21/2022

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FORM NLRB-4701
(9-03)

NATIONAL LABOR RELATIONS BOARD

NOTICE OF APPEARANCE

Teamsters Local 848

and

XPO Logistics Cartage, LLC dba XPO Logistics

CASE 21-RC-289115

☒ REGIONAL DIRECTOR

☐ EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

☐ GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

THE UNDERSIGNED HEREBY ENTERS APPEARANCE AS REPRESENTATIVE OF Teamsters Local 848

IN THE ABOVE-CAPTIONED MATTER.

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(REPRESENTATIVE INFORMATION)

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CELL PHONE NUMBER: 310-625-9853 *FAX:* 818-973-3201

SIGNATURE: *(Please sign in ink.)*

DATE: 1/21/2022

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FORM NLRB-4701
(9-03)

NATIONAL LABOR RELATIONS BOARD

NOTICE OF APPEARANCE

Teamsters Local 848

and

XPO Logistics Cartage, LLC dba XPO Logistics

CASE 21-RC-289115

☒ REGIONAL DIRECTOR

☐ EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

☐ GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

THE UNDERSIGNED HEREBY ENTERS APPEARANCE AS REPRESENTATIVE OF XPO Logistics Cartage, LLC dba XPO Logistics

IN THE ABOVE-CAPTIONED MATTER.

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(REPRESENTATIVE INFORMATION)

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CELL PHONE NUMBER: _____ *FAX:* (917) 344-1311

SIGNATURE: _____
(Please sign in ink.)

DATE: January 25, 2022

[1] IF CASE IS PENDING IN WASHINGTON AND NOTICE OF APPEARANCE IS SENT TO THE GENERAL COUNSEL OR THE EXECUTIVE SECRETARY, A COPY SHOULD BE SENT TO THE REGIONAL DIRECTOR OF THE REGION IN WHICH THE CASE WAS FILED SO THAT THOSE RECORDS WILL REFLECT THE APPEARANCE.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

XPO LOGISTICS CARTAGE, LLC DBA XPO LOGISTICS

Employer

and **Case 21-RC-289115**

TEAMSTERS LOCAL 848, TEAMSTERS LOCAL 542

Petitioner

ORDER RESCHEDULING HEARING

IT IS HEREBY ORDERED that the hearing in the above-entitled matter is rescheduled from February 8, 2022, at 9:00 AM to **Thursday, February 10, 2022, at 9:00 A.M.** via videoconference. The hearing will continue on consecutive days until concluded.

The Employer's Statement of Position in this matter must be filed with the Regional Director and served on the parties listed on the petition by no later than **noon** Pacific time on **Wednesday, February 2, 2022.** The Petitioner's Responsive Statement of Position must be filed with the Regional Director and served on the parties listed on the petition by no later than **noon** Pacific time on **Monday, February 7, 2022.** The statements of position must be E-Filed but, unlike other E-Filed documents, they must be filed by noon Pacific time on the due date in order to be timely. If an election agreement is signed by all parties and returned to the Regional Office before the due date of the Statement of Position or the Responsive Statement of Position, then the Statement of Position or the Responsive Statement of Position is not required to be filed.

Dated: January 31, 2022

WILLIAM B. COWEN
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 21
US Court House, Spring Street
312 N Spring Street, 10th Floor
Los Angeles, CA 90012

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 848 and LOCAL 542 Petitioners, - and - XPO LOGISTICS CARTAGE, LLC, Respondent. .	Case No. 21-RC-289115

XPO LOGISTICS CARTAGE, LLC'S
REQUEST TO HAVE COMPLETE RECORD

XPO Logistics Cartage, LLC ("XPO" or "Respondent") hereby requests that the Hearing Officer allow the parties to create a complete record, and that they not be required to rely on the record from another pending case with respect to the important issues of employee status and bargaining unit determination, or to be confined to making an offer of proof.

ARGUMENT

A. BACKGROUND FACTS

In 2017 and 2020, XPO participated in an unfair labor practice trial before Administrative Judge Christine Dibble in Case Nos. 21-CA-150873, 164483, 175414, and 192602. The last day evidence was received was October 8, 2020, which is nearly 14 months ago in a matter involving a limited evidentiary time frame. Judge Dibble issued her Decision on April 30, 2021, XPO filed timely Exceptions, and the case has been pending before the Board since May 28, 2021.

The case before Judge Dibble involved the issue of whether the tractor Owner-Operators and the second seat drivers providing services at XPO's Commerce facility were independent contractors or employees under the Act. The record in the C-case was built on allegations that span from the beginning of 2015 to 2017, and

involved only Owner-Operators or second seat drivers at the Commerce facility. The record contained no facts regarding the tractor Owner-Operators or second seat drivers working out of XPO's San Diego facility. Further, the record contained no facts regarding either the Commerce Owner-Operators or second seat drivers post-2017, or the two-facility bargaining unit requested by the Petitioner in this case.

B. THE GENESIS OF THE COMPLETE RECORD ISSUE

In the course of discussions with the Region, the Region raised the issue of whether the record in this case should be based primarily on the record established years ago in an unfair labor practice case involving the Owner-Operators and second seat drivers at Commerce. As part of these discussions, the Region has requested that XPO explain why that would be insufficient and to identify the areas in which it believes that live testimony is required.

As explained below, limiting the record in this case to the record in the C-case would be inappropriate, and live testimony is necessary and required with respect to: (i) current and contemporary evidence regarding the employee v. independent contractor status of the San Diego Owner-Operators or second seat drivers, (ii) current and contemporary evidence regarding the Commerce Owner-Operators and second seat drivers with a focus on evidence excluded from the C-case record, changes that have taken place during the intervening years, and a comparison of the facts with San Diego, and (iii) contemporary facts that relate to the petitioned-for multi-facility bargaining unit issue in this case.

C. XPO HAS THE LEGAL RIGHT TO DEVELOP A COMPLETE RECORD ON ALL ISSUES

The Board has a long-standing policy of requiring its Hearing Officers to develop a full record. For example, Section 11181 of the Casehandling Manual Part Two Representation Proceedings ("Manual") states:

> Nature and Objective of Hearing. The R case hearing is a formal proceeding the purpose of which is to adduce record evidence on the basis of which the Board may discharge its duties under Section 9 of the Act. As such, it is investigatory, intended to make a <u>full record</u> and nonadversarial. (emphasis supplied.)

Consistent with this, in defining the duties of the Hearing Officer, Section 11188.1 states in pertinent part:

> Subject to the provisions of Sec. 102.66, it is the duty of the Hearing Officer to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board and the Regional Director may discharge their duties under Section 9(c) of the Act. It is also the duty of the Hearing Officer to keep the record as short as is commensurate with its being complete. This also minimizes the significant costs associated with a hearing….. The Hearing Officer should guide, direct, and control the hearing, excluding irrelevant and cumulative material and not allowing the record to be cluttered with evidence submitted "for what it's worth." [emphasis supplied]

Thus, while the Hearing Officer is to keep the record from becoming overly cluttered with extraneous evidence, the first and primary goal is a complete record. To be sure, the Hearing Officer has the ability to thwart attempts to introduce irrelevant or cumulative testimony, but again, this is secondary to permitting the parties to introduce evidence of significant facts that support the party's contentions and are relevant to a litigable issue. Manual 11189(k)

The obligation of the Hearing Officer to develop a complete record also is underscored in the Guide for Hearing Officers in NLRB Representation and 10(K) Proceedings. ("Guide.") Of significance is the broad range of evidence that the Hearing Officer deems relevant and permits in the case of a dispute over independent contractor status.

With respect to the importance of ensuring that the record contains relevant information, the Guide provides that, "[e]vidence is relevant if it has a tendency to make more or less probable a fact of importance to the issue under consideration. FRE 401. If the evidence offered is going to be of help in deciding the matter under consideration, it should be admitted; if not, it should be excluded."

For example, with respect to the "fact-intensive" inquiry into the status of independent contractors, the Manual contains a comprehensive list of the evidence that is relevant and should be admitted. Manual, VI A. Notably, the Hearing Officer is not directed to limit the inquiry to one location and exclude evidence regarding

the other. Nor, is the Hearing Officer directed to build a record based on stale evidence from years ago, especially when the record in the old case was incomplete.

The lead case on this issue is *Jersey Shore Nursing & Rehabilitation Center,* 325 NLRB 603 (1998). In *Jersey Shore*, the Board adopted the Regional Director's Decision finding that the hearing officer properly struck the balance between the due process right of the parties to present evidence and to argue their position concerning relevant issues and the need to prevent unwarranted burdening of the record and unnecessary delay. *Id. a*t p. 603.

In upholding the exclusion of the requested testimony, the Regional Director, with the subsequent concurrence by the Board, relied on the fact that the unit sought by the petitioner was presumptively appropriate under the hospital bargaining unit rule, and that the proffered evidence did not overcome that presumption. *Id. a*t p. 603.

In essence, the evidentiary issue in *Jersey Shore* turned on a finding that, because of the hospital bargaining unit rule, the evidence that the employer wanted to put in the record was not relevant. The same cannot be said with respect to the evidence that XPO seeks to admit in this case regarding contemporaneous facts pertaining to independent contractor v. employee status, and the propriety of the two-facility unit sought by the unions.

Although there is not a lot of Board law on the topic, there is controlling Ninth Circuit law in a case involving a decision by Region 21 to prohibit an employer from putting on relevant bargaining unit evidence. *NLRB v. St. Francis Hospital of Lynwood,* 601 F.2d 404 (9th Cir. 1979).

In *St. Francis,* which preceded the hospital bargaining unit rule, the employer was precluded from introducing evidence regarding the appropriateness of the bargaining unit sought by the union. Instead, it was limited to an offer of proof. The reaction of the Ninth Circuit was predictable.

As the Court found, the refusal to accept direct evidence on an essential issue—the bargaining unit—was "clearly prejudicial," even if the party was permitted to make an offer of proof. Thus, the Court held that the Board's actions were "arbitrary and capricious."

In reaching this conclusion, the Court stated:

> "The Act accords a great degree of finality to the Board's findings of fact, and this Court has been insistent that the admonition of the Act be strictly observed. But courts which are required upon a limited review to lend their enforcement powers to the Board's orders are granted some discretion to see that the hearings out of which the conclusive findings emanate do not shut off a party's right to produce evidence or conduct cross-examination material to the issue. The statute demands respect for the judgment of the Board as to what the evidence proves. But the court is given discretion to see that before a party's rights are finally foreclosed his case has been fairly heard. Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed." *Id.* at 417.

Analytically, there is not a significant difference between excluding all evidence and a significant amount of relevant evidence as the same prejudice attaches in both instances.

Similarly, an effort to limit the record in this case to the incomplete record created years ago in the C-case would be inappropriate if only for the fact that the case is pending before the Board and is not a final Board order. *See, for example, Richfield* 369 NLRB No. 111 (2020), *Hospitality Wolf Creek Nuclear Operating Corp.* 365 NLRB No. 55 (2017).

D. UNDER THE LONG-ESTABLISHED STANDARD, THERE IS NO BASIS FOR PREVENTING XPO FROM DEVELOPING A COMPLETE RECORD

As established above, a Hearing Officer's primary duty is to create a "full record," and "to inquire fully into all matters and issues necessary to obtain a full and complete record." Without this, the Regional Director and the Board will not be able to "discharge their duties under Section 9(c) of the Act."

There is a single exception to the "complete record" rule. A Hearing Officer may exclude proffered evidence if it is "irrelevant and cumulative," and little more than "for what it is worth." This limited standard has no application to XPO's request that it be permitted to develop a full record.

The admission of (i) evidence that previously was excluded by Judge Dibble, (ii) facts that occurred at Commerce subsequent to the close of the record in the C-case, (iii) contemporary facts that relate to the petitioned for multi-facility bargain unit issue, and (iv) contemporary facts regarding the status of the San Diego Owner-Operators and second seat drivers, cannot be "cumulative" as they exist nowhere in the record in the C-case. Further, this evidence cannot by any stretch of the imagination be considered to be "irrelevant" as it relates to the two primary issues in this case—independent contractor status and bargaining unit determination.

There is one other simple reason that the parties should be able to make a complete record: it is unclear whether the Board will agree with the General Counsel that the *Super Shuttle* standard for determining independent contractor v. employee status should be rejected and, if so, what should be the new standard. *See* GC Memo 21-04 at p. 4. With this standard potentially in play, the parties should be given extra leeway in developing the record in the hopes that it will contain the facts that the Board and the courts ultimately find relevant to the independent contractor-employee question.

E. THE PRIOR COMMERCE RECORD IS WOEFULLY INCOMPLETE

Notwithstanding the protestations of XPO to Judge Dibble, she improperly refused to allow XPO to create a complete record on the limited Commerce independent contractor issue before her. For example, she refused to allow XPO to enhance support the finding that the Owner-Operators' gross payments varied greatly, a critical factor under the *Super Shuttle* entrepreneurial opportunity test. (*See* XPO Cartage, Inc. Post-Hearing Brief at pp. 21-22, and Appendix A thereto, attached as Exhibit 1.) This included Judge Dibble's erroneous decision to exclude evidence that demonstrates the entrepreneurial consideration that Owner-Operators take into account when accepting or rejecting loads, such as traffic density, time of day, customer selection, and incentive pay. (*See Id.)*

As this and other relevant evidence does not appear in the record developed by Judge Dibble, it necessarily will be absent from the record in this instant case unless XPO is permitted to introduce it in the instant matter.

F. THE PROPOSED RELIANCE ON OUT-DATED AND CHANGED EVIDENCE IS WITHOUT PRECEDENT

Reminiscent of the 2014 animated movie, *Frozen In Time,* Frozen in Time (2014) - IMDb, a decision to preclude Commerce evidence since 2017 would mean that neither the classification issue nor the combined unit issue would be based on contemporaneous evidence. For example, XPO would not be permitted to show that changes made over the last five years—including modifications in compensation, the dispatching process, and updates to technology, among others—all point towards enhanced freedoms of the Owner-Operators. This would impact the ultimate decision in two important respects.

First, it would mean that the classification decision regarding Commerce Owner-Operators and second seat drivers would be based on stale and, in material respects, now outdated evidence. This contrasts with the ability of the Board to decide the very same issue with respect to the San Diego Owner-Operators and second seat drivers based on contemporaneous evidence.

Second, the unit determination would be made based on a split record—partly based on current facts and partly based on five year old facts. Such a result would be inconsistent with the RD's obligation to create a complete and accurate record.

G. AN OFFER OF PROOF WOULD NOT BE AN ADEQUATE SUBSTITUTE FOR LIVE TESTIMONY

Pursuant to the Board's guidelines and practices, a hearing officer who excludes evidence often believes that the error can be cured if the party seeking to introduce the evidence is permitted to make an offer of proof. As established in the Ninth Circuit's *St. Francis* decision, this is not the case and it renders the evidentiary exclusion no less "arbitrary and capricious."

With specific reference to this case, there are several reasons why an offer of proof would not be a suitable substitute for a complete record.

First, an offer of proof regarding the core issues in this case—independent contractor vs. employee status and the propriety of a multi-facility unit—would go far beyond the issues that usually are the subject of offers of proof, such as the supervisory status of a particular individual.

Second, permitting live testimony will result in a much more complete record, which is especially critical given that the *Super Shuttle* standard may be in play. This is because the Petitioners will have an opportunity to put on their own evidence and to cross examine XPO's witnesses. In addition, the Hearing Officer will be obligated to ask any necessary questions that he or she determines are appropriate for the development of a full record. Use of this time-honored process will, unlike an offer of proof read into the record, create a record that is commensurate with the important issues raised in this case.

CONCLUSION

For all of the foregoing reasons, XPO respectfully requests the right to develop a complete and accurate record on both the independent contractor issue, and the bargaining unit issue.

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Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 848 and LOCAL 542 Petitioners, - and - XPO LOGISTICS CARTAGE, LLC, Respondent. .	Case No. 21-RC-289115

XPO LOGISTICS CARTAGE, LLC'S POST-HEARING BRIEF

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XPO LOGISTICS CARTAGE, LLC'S
POST-HEARING BRIEF

XPO Logistics Cartage, LLC ("XPO") hereby submits its Post-Hearing Brief in support of its position that the National Labor Relations Board ("NLRB" or "Board") lacks jurisdiction to authorize a representation election in the above-captioned matter. The Owner-Operators and their second-seat drivers whom the International Brotherhood of Teamsters, Locals 848 and 542 (the "Union" or "Petitioner") have petitioned to represent are independent contractors under the National Labor Relations Act ("NLRA" or "Act"). Additionally, the two-facility unit sought by the Union is inappropriate because the facilities do not share a sufficient community of interest. In the event any election is ordered based on a finding of employee status and a sufficient showing of interest has been made, separate elections should be conducted at each of XPO's Commerce, California and San Diego, California facilities.

I. INTRODUCTION

"[I]f you enjoy what you do, you never have to work a day in your life."[1] That quotation from, Troy West, one of XPO's Owner-Operators whom the Union seeks to represent stands in stark contrast to the cynical theme of "indentured servitude" and "sharecropping" that the Union has been spreading both in public and in their opening statement in this case. The facts and record evidence, however, demonstrate a version of reality squarely in keeping with XPO's position that the Owner-Operators it contracts with are actually small businesspeople who through the ownership of their trucks have the entrepreneurial opportunity to not only make a heathy living for themselves, but also to grow their businesses (by, among other things hiring, supervising, and paying the very second-seat drivers the Union claims are XPO employees)

[1] West: 801:14-15.

while also enjoying the freedom and flexibility of being an independent contractor in a manner that an employment relationship simply cannot provide.[2]

Along these lines, this Post-Hearing Brief focuses on the record evidence developed in the 12-day hearing examining (1) whether as a threshold matter, contracted Owner-Operators and their hired drivers, referred to as "second-seat drivers," who together fulfill a portion of XPO's intermodal transportation obligations to its customers, are independent contractors or XPO's employees, as defined by the Act under the current standard in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), and the criteria applied by the Court of Appeals for the D.C. Circuit in *FedEx Home Delivery v. NLRB ("FedEx I")*, 563 F.3d 492 (D.C. Cir. 2009) and *FedEx Home Delivery v. NLRB ("FedEx II")*, 849 F.3d 1123 (D.C. Cir. 2017); and (2) whether those Owner-Operators and second-seat drivers at two separately-run XPO facilities located more than 130 miles apart constitute an appropriate bargaining unit.

(1) *Independent Contractor Status.* The Board is presently considering whether it should revisit or maintain the *SuperShuttle* standard,[3] and instead apply the previous standard in *FedEx Home Delivery*, 361 NLRB 610, 611 (2014) (which the D.C. Circuit rejected in *FedEx II*), or whether it should adopt a different test altogether. Under either standard, or indeed under any standard that faithfully adheres to the non-exhaustive common-law factors enumerated in the Restatement (Second) of Agency §220 (1958), the Owner-Operators and second-seat drivers at

[2] Moore: 827:9-14, 829:14 - 830:9 (Describing the "Life-changing" opportunity he had to change from an employee-driver to an independent contractor, which helped him put "[his] family in a better financial situation.").

[3] On December 27, 2021, the Board invited briefing in *The Atlanta Opera, Inc. and Make-Up Artists and Hair Stylists Union, Local 798, IATSE*, Case 10–RC–276292 to determine: "1. Should the Board adhere to the independent-contractor standard in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019)? 2. If not, what standard should replace it? Should the Board return to the standard in FedEx Home Delivery, 361 NLRB 610, 611 (2014), either in its entirety or with modifications?"

issue are not XPO's employees. The record evidence clearly establishes that the tractor Owner-Operators are in fact entrepreneurial businesses and individuals who are independent contractors over whom XPO exercises little control, and who are expressly excluded from the Act's "employee" definition in Section 2(3) (stating that the term "employee" shall not include "any individual having the status of an independent contractor"). Their second-seat drivers, moreover, are one step further removed from any purported employment relationship with XPO because the Owner-Operators themselves, not XPO, maintain either an employment or an independent contractor relationship with them. Because the Owner-Operators and second-seat drivers in the petitioned-for unit are not statutory employees, an election should not be ordered.

The nature of XPO's intermodal service and business, underlies the independent contractor framework that the company has utilized in both Commerce and San Diego, although the two terminals maintain separate operations, as discussed below. Intermodal transport involves the transportation of commercial goods by varying transportation modes from port, to road, and to rail. This is not a small parcel pick-up and delivery model, warehouse storage delivery to customer model, or a "less-than-truckload" model (also known as "LTL"), a business that another XPO entity engages in and for which it hires thousands of truck drivers who are actually classified as employees. Here, Owner-Operators and their second-seat drivers pick up chassis and container combinations at the port or a warehouse and deliver them to rail terminals for nationwide transport at a lower-cost but slower alternative to over-the-road trucking. They also perform the same operation in reverse. With respect to both the Commerce and San Diego facilities, the customer cost of the "bookend" trucking portion of the delivery of a container and its chassis, performed by Owner-Operators and their second-seat drivers, is only a small fraction of the total cost and the overall planning involved in moving a container over thousands of miles

by various modes of transport. The business of XPO is thus logistics and coordinating intermodal transportation, not performing short haul truck deliveries; the latter business is the domain of the Owner-Operators and their drivers. Fees that XPO's clients pay are not negotiated out of XPO's Commerce or San Diego facilities. Rather, the customers of XPO pay prices set by XPO's parent entity in Dublin, Ohio for intermodal transport across the country. The Owner-Operators are thus in a completely different business from XPO.

In *SuperShuttle*, consistent with what the D.C. Circuit required in *FedEx I* and *FedEx II*, the Board ruled that in addition to control, it must evaluate whether the putative contractor has significant economic opportunity for gain or loss. As the record here demonstrates, much has changed since previous matters were contested between XPO and the Union, and any supposed controls have been reduced while significant entrepreneurial opportunities for economic gain or loss afforded to Owner-Operators and their second-seat drivers have been enhanced in the relevant time period. New technology introduced since 2018 has amplified the freedom and flexibility Owner-Operators and their second-seat drivers enjoy, and XPO has further limited its interactions with them. This entrepreneurial opportunity is also reflected in the fact that many Owner-Operators (whether individuals or corporate entities) can and do generate revenues of more than $100,000 annually. In fact, the highest grossing Owner-Operator in 2021 owns and operates multiple trucks with a half dozen or more drivers and generated revenue of more than $680,000 in 1099 income from contracts with XPO, in addition to revenue earned from providing trucking services to other motor carriers. Other Owner-Operations who are less interested in pursuing XPO delivery opportunities or who are not as efficient in running their businesses earn much less. These wide-ranging results are a direct product of various business decisions the Owner-Operators have chosen to make. There are virtually no requirements,

controls or restrictions imposed by XPO on Owner-Operators or their second-seat drivers apart from those required for safety reasons by federal and state law restricting their performance of chassis and container delivery services for XPO customers. As part of the intermodal transport services XPO arranges in the competitive Los Angeles and San Diego markets for its customers, XPO offers both individual and corporate Owner-Operators and by extension their second-seat drivers the ability to choose from a broad selection of available loads and fees—or to choose to take none at all. Owner-Operators unilaterally decide whether to hire second-seat drivers and how to deploy them, whether to lease or purchase and operate more than one tractor, and whether to accept or decline opportunities to deliver to XPO customers, and even whether to provide services to others, either under their own authority, or by simultaneously hauling for another motor carrier. In this regard, Owner-Operators are XPO's vendors, and XPO is the customer of the Owner-Operators. Except for safety-related compliance with federal and other state regulatory requirements for commercial truck drivers, XPO exercises virtually no control over the Owner-Operators' business decisions, how they elect to use their time, or which deliveries they elect to accept or not accept. Loads are offered. Owner-Operators and their second-seat drivers decide whether to accept or decline them. All in all, the record evidence demonstrates numerous factors reflecting entrepreneurial opportunity that exists for, and XPO's lack of control over, the Owner-Operators and their second-seat drivers:

- The wide range in Owner-Operator compensation;
- The Owner-Operators' total autonomy to decide whether, when, where, and how long to work;
- The Owner-Operators' total discretion to accept or reject loads;
- The significant opportunities individual and corporate Owner-Operators have to increase their income;

- The Owner-Operators' ability to hire second-seat drivers to work in addition to them or in their stead, as Owner-Operators do not have to drive at all and some have chosen to take advantage of this to manage their fleet;

- The significant initial investment Owner-Operators have to make in acquiring one or more tractors;

- The Owner-Operators' responsibility for the operational decisions relating to the tractor and the services provided, as they decide which trucks to purchase or lease, where and who should maintain them, and even the routes they (or their drivers) take to their destinations when they agree to accept a load from XPO;

- The Owner-Operators' ability to choose to simultaneously contract with another motor carrier to provide services, or, by obtaining their own authority, directly contracting to haul for their own customers;

- XPO not requiring uniforms, or even that the Owner-Operators physically appear at XPO's terminals to accept loads;

- The Owner-Operators taking on a serious risk of loss when entering into a relationship with XPO;

- The Owner-Operators' ability to negotiate their compensation;

- The Owner-Operators signing an agreement with XPO acknowledging their independent contractor status;

- XPO not withholding taxes from the Owner-Operators' settlements and not providing them with fringe benefits;

- The Owner-Operators indemnifying XPO for various losses or damages that may arise during the performance of their services; and

- XPO compensating Owner-Operators by the assignment, after they or their second-seat drivers select from the available options.

Regardless whether *SuperShuttle*, *FedEx I* or *FedEx II*, or some other test is applied, these clear indicia of independent contractor status—circumstances that typically are not part of an employer-employee relationship—fulfill the requirements imposed by the various common law agency factors.

(2) *Separate Bargaining Units.* Moreover, the San Diego and Commerce facilities are functionally so separate that the Union's petitioned-for unit combining both sites is simply not

appropriate. In addition to being more than 130 miles apart, the facilities function with separate staffs and management; utilize separate dispatch systems to offer loads; offer separate and distinct compensation for the work performed by Owner-Operators and their second-seat drivers; and engage in negligible coordination, cross-utilization, or overlap of personnel, equipment, of facilities. What little evidence of operational overlap exists is but a small fraction of the overall operations of both sites. Furthermore, whereas the Owner-Operators and second seat drivers moving loads out of the Commerce facility service myriad XPO customers throughout the greater Los Angeles area, those operating out of the San Diego XPO facility, move loads mostly between San Diego and the Los Angeles area for two main customers of XPO located south of the Mexican border, a key distinction that also drives differences in working conditions, opportunities, and remuneration. Because there is insufficient community of interest among the Owner-Operators and second-seat drivers across the two facilities, the multi-facility unit is inappropriate.

II. SUMMARY OF EVIDENCE

A. XPO Logistics Cartage LLC's Intermodal Operations

As a logistics company, XPO provides coordination services to complete intermodal deliveries of commercial freight throughout the contiguous United States, primarily in large gateway markets, and gateway markets for containerized sealed freight movements.[4] Intermodal is the transportation of goods using two or more modes of transportation; here railroads and trucks. XPO partners with railroad vendors to complete the long-haul portion of a move, while it partners with Owner-Operators to complete the short-haul portions that bookend the railroad portion of the move.[5] In the intermodal business, the Owner-Operators provide only a limited

[4] Tibbetts: 31:2-32:21; XPO Exhs. 1, 2.
[5] Tibbetts: 43:15 - 48:13.

portion of the overall transportation services needed to move the freight owned by XPO's customers. Because the Owner-Operators are providing services that constitute a small piece of a much larger move, the nature of their business prevents them from negotiating with XPO's customers. It is not possible for Owner-Operators to negotiate directly with the cargo owners in the intermodal business because they do not have the contracts with railroad providers that XPO does, nor do they have the capability to provide the trucking services on the other end of the intermodal move, which could be thousands of miles from where the Owner-Operator is based. Thus, the Owner-Operators are bidding for a small piece of a bigger move that is paid separately from what the customer pays XPO.[6]

Similarly, because XPO's functions are limited, it does not provide any equipment used in the movement of its customers' goods. The Owner Operators own or lease their own tractors.[7] XPO does not own the steamships, rent the port terminals, own rail cars or yards, own or provide tractors, own the chassis attached to the tractors, or own the containers being hauled.[8] Owner-Operators and their drivers play a limited local role in the intermodal process: moving a chassis and container combination, neither of which is owned by XPO.[9] The chassis and container are thus not an instrumentality of the work being provided by XPO; instead, movement of the chassis and the container with the Owner-Operator's tractor is the contracted-for work being

[6] Tibbetts: 43:9-46:1; XPO Exh. 3 (Example of Intermodal Move).
[7] Freeman: 302:20-25 (Owner-operators own their own trucks, and can own multiple trucks); West: 757:10-12 (When signing up to drive for XPO, he was required to provide proof he had his own truck); Avalos: 1005:18-23 (XPO does not own the trucks driven by Owner-Operators or second-seat drivers).
[8] Tibbetts: 45:6 - 46:1 (The containers are owned by XPO's Customers or third-parties, and the same is true of the chassis and railcars that are utilized during an intermodal move); Limuaco: 648:13 - 649:1, 717:11-16 (The railroads own the chassis, not XPO); Limuaco: 649:2-9 (XPO Cartage does not own the containers).
[9] Tibbetts: 43:19 - 44:5 (The Owner-Operators and second-seat drivers perform the short-haul part of an intermodal move).

performed by the Owner-Operators and their second-seat drivers. Indeed, the fact that XPO daily offers trips to contractors to move or reposition empty containers from one location to another is further evidence of this fact.

B. XPO's Operations Are Regulated By Federal And State Laws

XPO is a federally licensed motor carrier regulated by the Federal Motor Carrier Safety Act that arranges transportation to meet customer needs through contracts with commercial truck Owner-Operators to transport freight between rail yards or marine terminals and customers. Applicable federal law requires XPO to ensure that any individuals moving freight under its motor carrier authority meet the qualifications for drivers set forth in the Federal Motor Carrier Safety Regulations ("FMCSRs") and its minimal insurance and safety standards.[10]

Fundamentally, safety is a shared responsibility among XPO and Owner-Operators and their second-seat drivers.[11] No driver—including a second-seat driver—can drive a commercial motor vehicle unless they complete and furnish to the federally regulated motor carrier, in this case XPO, an application meeting certain content requirements. See 49 C.F.R. § 391.21. All XPO does is the legally required ministerial act of ensuring that second-seat drivers complete these forms consistent with federal and local regulations.

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[10] Freeman: 1546:12 - 1547:4 (The safety regulations apply to all motor carriers and drivers, regardless of whether they are employees or contactors); *see also* 49 C.F.R. § 376.12(c)(4) ("Nothing in [the provisions of the lease agreement required by the regulations] is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee."); 49 C.F.R. § 390.5 (defining "employee," as used in the safety regulations, to include "an independent contractor while in the course of operating a commercial motor vehicle.").

[11] Freeman: 535:1-21 (XPO's safety program was developed to follow the federal and state safety regulations and reflects the responsibility shared between XPO and drivers to keep the public safe); Freeman: 1546:12 - 1547:4 (The safety regulations apply to all motor carriers and drivers, regardless of whether they are employees or contactors); Dominguez: 1502:15 - 1503:1 (Safety regulations apply regardless of who you are driving for); Dominguez: 1502:19-22 (Safety is a shared responsibility between the drivers and XPO).

Moreover, the federal regulations require XPO to examine the character and driving history of a driver, and XPO's refusal to allow an Owner-Operator to utilize a driver for XPO's customers is consistent with that mandate. 49 C.F.R. § 391.21 is located under Subpart C titled "Background and Character," and various federal regulations define Subpart C as "relating to disclosure of, investigation into, and inquiries about the background, *character*, and *driving record* of drivers." *See* 49 C.F.R. §§ 391.67(b); 391.68(b) (emphasis added). The regulations thus presume that a motor carrier will be able to decide whether a particular driver may perform services for the motor carrier, regardless of whether a driver is an employee or independent contractor.

C. Owner-Operators Are Small-Business Owners Whose Success Depends On Their Entrepreneurial Ability

1. The Independent Contractor Operating Agreements Executed By Owner-Operators Evidence Their Entrepreneurial Opportunity

In order to haul commercial freight for XPO, Owner-Operators enter into an Independent Contractor Operating Contract (hereinafter "ICOC") with XPO.[12] The contract states in no uncertain terms that the Owner-Operators are independent contractors, and not employees, and even includes a direct acknowledgement of that status in Schedule N.[13] A key provision of the ICOC guarantees the Owner-Operators' freedom to provide services to any company they choose:

> Contractor may operate the Vehicle for alternative uses. . . . Except as restricted by Applicable Law (including 49 CFR Part 376), nothing in this Contract will prohibit Contractor from performing transportation services for other carriers, brokers or directly for shippers.[14]

[12] See XPO Exh. 13.
[13] See XPO Exh. 13 at 3, 4, Schedule N.
[14] XPO Exh. 13 at Section 4(C).

And this is no mere illusion. The record contains evidence that Owner-Operators can and do chose to simultaneously operate either under their own authority, or under that of another motor carrier[15] Similarly, Section 12 of the ICOC underscores that Owner-Operators are not "prohibited from using Contractor's Vehicles for the pickup, transportation, or delivery of property for more than one motor carrier or any other person or entity."[16]

The ICOC is in effect for only 90 days, after which it must be renewed by the parties.[17] Even within that term, an Owner-Operator can terminate the ICOC for any reason by providing 30 days' notice to XPO.[18] XPO, on the other hand, may terminate the ICOC only for a material breach.[19]

Schedule B of the ICOC, which is unique to each terminal, provides a schedule of rates being offered for specific types of work and expressly contemplates that Owner-Operators may engage in pay negotiations with XPO.[20] This is not mere verbiage, because Owner-Operators do in fact negotiate premium pay above the rates offered on Schedule B, which is reviewed and

[15] Freeman: 258:10 - 259:1, 327:6-11 (Carlos Penilla is an Owner-Operator who runs loads for other companies, and has told XPO dispatch that he does so. Another Owner-Operator that formed the entity Safe Chem also turns down loads from XPO dispatch because he is running loads for another company. Further, Anton Perrira, an Owner-Operator operating out of Commerce, had his own authority and hauled for Nick's Trucking while under contract with XPO); Freeman: 326:21 - 327:4 (Jose Morales is another example of an Owner-Operator who would move loads for other companies while under contract with XPO); Limuaco: 619:10-15 (Owner-Operators can haul freight for other companies while under contract with XPO); West: 793:13-20 (The Owner-Operator he currently works for has his own authority and can do work for companies besides XPO); Zouri: 877:18-22 (Operates one of his trucks with another company);Alvarez: 1164:15 - 1165:6 (You can work for another company while under contract with XPO).
[16] XPO Exh. 13 at Section 12.
[17] Darling: 100:14-24. XPO Exh. 13 at Section 3.
[18] XPO Exh. 13 at Section 21(A).
[19] XPO Exh. 13 at Section 21(B).
[20] XPO Exhs. 6, 7 at Schedule B, Section 2: "Changes In Fees."

reissued every 90 days.[21] In fact, since 2018, XPO's intermodal operations have become even more nimble in making adjustments to Owner-Operator compensation on Schedule B and the payment of negotiated premiums above schedule B. Particularly in those situations where market conditions and the demand for trucking services are high, XPO must negotiate with Owner-Operators to carry available loads, and the price they will charge to do so.[22]

Owner-Operators do not receive an hourly rate and are not guaranteed any revenue from XPO.[23] Instead, the Owner-Operators are paid based on the acceptance and performance of any assignment.[24] The Owner-Operators also indemnify XPO for various losses or damages that may arise during the performance of their services. [25]

While XPO can prevent an Owner-Operator from utilizing a particular driver to carry loads for XPO's customers, XPO has absolutely no control over whether the Owner-Operator hires a driver to carry loads for a different motor carrier.[26] As the customer of the Owner-Operators, XPO has the ability without affecting employment status to insist that the Owner-Operator not use a particular driver who disrupts and interferes with the safety of XPO's dispatching operation.[27]

[21] Darling: 100:14-24. XPO Exh. 13 at Section 3.
[22] Tibbetts: 37:19-39:1; XPO Exh. 135.
[23] XPO Exh. 13 at Section 12.
[24] XPO Exhs. 6, 7 at Schedule B; Exh. 13 at Section 2.
[25] See XPO Exh. 13 at Sections 6, 20.
[26] XPO Exh. 13 at Section 4(C) ("Except as restricted by Applicable Law (including 49 CFR Part 376), nothing in this Contract will prohibit Contractor from performing transportation services for other carriers, brokers or directly for shippers.")
[27] See XPO Exh. 13 at Section 5(A).

2. XPO Contracts Only With Owner-Operators That Possess Specialized Skills and Experience

To provide services to XPO and its customers Owner-Operators and their drivers must have at least twelve months of verifiable tractor-trailer driving experience.[28] Federal regulations further require that they be proficient in areas such as "safe operations regulations," "CMV safety control systems," "backing," "extreme driving conditions," "hazard perceptions," "emergency maneuvers," "skid control and recovery," "relationship of cargo to vehicle control," "vehicle inspections,"[29] "hazardous materials," "fatigue and awareness," "air brakes," and "combination vehicles." 49 C.F.R. §§ 383.111, 383.113. Beyond these basic requirements, some Owner-Operators and their drivers possess special licensing endorsements such as Hazardous Material endorsements, which require additional testing and enable them to perform specialized deliveries, which, if they choose to carry those loads, generate higher revenue for the Owner-Operator.[30] Owner-Operators and second-seat drivers confirmed that driving a tractor for XPO requires specialized skill.[31]

[28] Freeman: 208:17-18 (XPO requires that Owner-Operators and their drivers have at least 12 months of driving experience).

[29] Freeman: 1548:5-20 (The safety regulations require periodic vehicle inspections, which the motor carrier is required to keep records of).

[30] Freeman: 308:6-19 (XPO pays a premium for Hazmat loads to drivers who have chosen to obtain a Hazmat endorsement); Alvarez: 1161:3-18 (Obtained a Hazmat certificate and has received premiums of up to $500 for driving Hazmat loads).

[31] Dominguez: 1502:11-13 (Driving requires experience and skill); Ramirez: 1414:21-23 (Part of being an owner-operator is the skill needed to drive a truck); Freeman: 356:22 - 357:24 (It took Mr. Freeman about 300 hours over nine months to obtain his commercial driver's license); Naemo: 803:21 - 804:3 (It took three weeks of training, and three to six months of practice to acquire the skills needed to operate a truck); Naemo: 804:4 - 805:24 (Describing the differences between a car and a truck, and why it takes more skill to drive a truck); Moore: 833:15-21 (It took four to five months of school to get a commercial driver's license).

3. Owner-Operators Make Substantial Capital Investments In Their Businesses

Owner-Operators are referred to as Owner-Operators because they own the tractor that they operate. 49 C.F.R. § 376.2. The tractor itself represents a massive capital investment, and the decision of what tractor to buy, how to buy or lease it, whether to buy a used or new tractor is entirely up to the Owner-Operator.[32] XPO does not in any way assist with the purchase or financing of the tractors.[33]

Owner-Operators in fact obtain the trucks from a variety of sources and have complete discretion over color, make, and model.[34] The Owner-Operators control the appearance of their truck, except only for the federal regulatory requirement that the Department of Transportation Authority of the company they are serving be on the truck.

Protecting their investment requires the Owner-Operators to responsibly maintain their tractors.[35] Where, how, and when they do so is entirely their decision. Failure to make good maintenance decisions can directly affect an Owner-Operator's profitability.[36]

4. Owner-Operators Take Advantage of Entrepreneurial Opportunities to Expand Their Businesses

Ultimately, Owner-Operators are responsible for putting their trucks to profitable use, which can have life-changing effects.[37] They can do so in a number of ways beyond maximizing

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[32] Limuaco: 622:6-12 (Owner-operators are free to choose what type of truck they will drive and where to buy or lease the truck).
[33] XPO Exh. 13 at Sections 1(A), 4(A)(1); Limuaco: 622:6-14 (XPO does not lease or sell trucks).
[34] Limuaco: 622:6-14 (Owner-Operators are free to choose what type of truck they will drive and where to buy or lease the truck).
[35] XPO Exh. 13 at Section 6.
[36] Avalos: 143:5-17, 144:2-11 (The Owner-Operator determines when and how to maintain their truck, and failure to properly maintain their truck can result in lost opportunities).
[37] Moore: 827:9-14, 829:14 - 830:9 (The switch from an employee-driver to a contractor-driver has been life changing because of the financial opportunities); Moore: 836:4-7 (If he got another

the productive use of their tractor. Those that have the financial capacity and appetite for risk can and do expand their businesses through the purchase additional tractors and the hiring of additional drivers. Evidence at the hearing showed that numerous Owner-Operators in Commerce and especially San Diego owned multiple trucks and hire a half dozen or more drivers to operate them.[38]

Whether they own one or multiple tractors, Owner-Operators often hire "second-seat" drivers to operate them.[39] This maximizes the Owner-Operators' productive use of their investment by expanding the operating period of the tractor. For example, Omar Saib and Ali Aljibory are a father-son team that operate eight trucks with multiple second-seat drivers out of the San Diego terminal.[40] Recruiting, hiring, and paying second-seat drivers exclusively is the

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truck, he could probably retire by the age of forty-five); Zouri: 880:2-9 (Income potential as an Owner-Operator is greater than as an employee-driver)

Zouri: 883:17-25 (As an Owner-Operator, his goal is to grow his business and purchase additional trucks).

[38] Freeman: 299:1 - 300:1 (Second-seat driver refers to additional drivers that operate an Owner-Operator's truck, and Owner-Operators may choose to engage a second-seat driver); Aldrete: 1582:12-16 (Owns two trucks; one in his name and one in his company's name);

Vasquez: 1308:9-10 (Owns two trucks, and bought his second truck while the first was being repaired); Avalos: 955:21-23 (Drove for an Owner-Operator who owned two trucks); Limuaco: 600:4-19 (Providing examples of Owner-Operators with multiple trucks, including Omar Saib, Steve and Fadi Zouri, and Antonio Lopez); Limuaco: 600:24 - 601:5 (Twenty percent of the Owner-Operators at San Diego own multiple trucks).

[39] Aldrete: 1202:2-6 (Currently employs one second-seat driver); Aldrete: 1270:3-21 (Had up to three second-seat drivers at one time); Aldrete: 1578:6-13 (Has had approximately eleven second-seat drivers during his time working with XPO); Vasquez: 1308:11-13, 18-23 (Currently has two second-seat drivers, including his friend Mario Cevallos, who Mr. Vasquez recruited to drive his truck); Ramirez: 1409:6-8 (Made the decision not to hire a second-seat driver); XPO Exhs. 14, 15.

[40] Limuaco: 600:7-19.

responsibility of the Owner-Operator.[41] The Owner-Operators set the terms of engagement for second-seat drivers and determine what hours they will work.[42] Owner-Operators must also compete for the services of second-seat drivers.[43] While XPO reviews qualifications of second-seat driver, this function is a legally required ministerial act to insure second-seat drivers are qualified operators of a commercial motor-vehicle. *See* 49 C.F.R. § 391.21.

Owner-Operators choose from the more than one-thousand competitors of XPO to which they will offer their services.[44] Many Owner-Operators have contracted to provide services for many different companies. Owner-Operators can and do also choose to operate some of their trucks for XPO and others for different motor carriers, or get their own authority and haul for their own customers.[45]

5. Owner-Operators Have Control And Responsibility for Operating Their Businesses

Overwhelming evidence demonstrates that Owner-Operators have almost complete discretion over when, how, and where they will perform any work.[46] They decide for themselves

[41] Naemo: 810:15-25 (Describing how he negotiates the pay-per-trip with the Owner-Operator he drives for); Dominguez: 1489:9-15 (One Owner-Operator paid him a flat rate per load, but it was adjusted when a premium was paid for a particular load); Dominguez: 1497:9-14 (How much the Owner-Operator paid him varied depending on the load and other circumstances); Banales: 1536:5-20 (He was paid different amounts by different Owner-Operators, and that pay could be adjusted depending on the type of load or other circumstances).
[42] XPO Exh. 13 at Section 11.
[43] Dominguez: 1496:3-15 (He stopped driving for one Owner-Operator because he did not want to work under the conditions set by that Owner-Operator); Banales: 1539:9-11 (He stopped driving for one Owner-Operator because that Owner-Operator hired a different second-seat driver to drive his truck).
[44] West: 801:2-10 (He has chosen to drive for XPO and not one of their competitors).
[45] XPO Exh. 13 at Schedule T.
[46] Dominguez: 1469:19-21 (You can schedule work for the week through the pre-plan method, or use the off-shift plan if you want to start driving early in the morning); Vasquez: 1348:24 - 1349:2 (If you do not sign up for the pre-plan on Friday, you can still get loads on Monday); Ramirez: 1374:14-17 (Drivers who want to start early in the morning can do so); Samayoa Rosales: 1430:19-23 ("I can do movements whenever I want."); Alvarez: 1148:5-20, 152:22 - 1153:10 (Was able to go to school and work at the same time because he set his own schedule);

(and the second seaters they hire) if and when they will work; no minimum amount of days is required except that a tractor of a particular Owner-Operator must move under the contract at least once every 35 days.[47] Vacation decisions are made by Owner-Operators and they have no obligation to even inform XPO.[48] Mr. Alvarez, for example, discussed his ability to take up to six weeks off from work.[49] Mr. Avalos, too, described the freedom to take vacation when he chooses.

Alvarez: 1157:1 - 1158:21 (Drivers doing work at the ports have to work around the port schedules, which have limited operating hours that are not set by XPO); Aldrete: 1213:4-8, 17-20 (Drivers receive texts from XPO dispatchers and respond with the dates and times they want to work the following week); Avalos: 1026:3-10 (XPO offers the opportunity to receive loads any time of the day, seven days a week); Avalos: 1032:6-10 (Has the opportunity to work on Saturdays if he chooses); Avalos: 1041:9-11 (Chose to take three weeks off in January 2020); Freeman: 256:9-24 (Owner-Operators do not have shifts, and how much they work depends on each individual Owner-Operator's entrepreneurial drive); Freeman: 257:8-18, 258:8 - 259:1 (There are a number of Owner-Operators who only drive on certain days at certain times);

Freeman: 300:11 - 301:13 (XPO offers Owner-Operators the freedom to choose their own schedule, which is appealing to the Owner-Operators who are running their own businesses)

Freeman: 505:14 - 506:7 (Drivers can choose when to work, and the amount drivers actually work varies based on their personal choices); Limuaco: 556:13 - 557:6 (Drivers can contact XPO dispatch to let them know when they want to work); Limuaco: 618:19 - 619:3 (XPO does not dictate when drivers must operate; drivers are free to choose when they want to work and take vacations when they want); Limuaco: 703:4-8 (One of the challenges with dispatching loads is that drivers can choose which loads to take and when to work); West: 759:11-15 (As an Owner-Operator, you can choose your starting time and which loads you want to take); Naemo: 857:21-858:1 (Can choose which days to work and when to take vacation); Naemo: 860:9-23 (You are free to choose which days you want to work and when you want to start or stop working)

Moore: 834:13-25 (There is significant scheduling flexibility, and you can start or stop driving for the day when you choose); Moore: 835:4-13 (Scheduling flexibility gives him more time to be with his family); Zouri: 879:13-14 (Can choose his own schedule).

[47] Freeman: 301:19-20 ("So the minimum requirement is to take a dispatch within 35 days."); Naemo: 858:24 - 859:2 (The only minimum work requirement is to take at least one load every thirty days).
[48] West: 776:6-13 (No need to notify XPO when you are going on vacation); Zouri: 882:17-22 (Can take whatever days off he chooses and take vacation without having to inform anyone).
[49] Alvarez: 1162:19-24

Because XPO typically has loads available 24 hours a day, no limitation exists on what hours the Owner-Operators and their drivers can work except for those limits imposed by the FMSCRs that apply to all commercial drivers.[50] XPO does not schedule start times, end times, or shifts. Owner-Operators unilaterally decide when to drive based entirely on their preferences.[51] For example, some Owner-Operators and their drivers only drive "once a week or a couple of times a month.[52] Another Owner-Operator only drives once a week because his wife won't let him work more than that.[53]

Owner-Operators even decide what driving work they will perform. They are not assigned to any specific deliveries or regions. XPO frequently provides the Owner-Operators and their drivers with multiple delivery options from which they can choose or, over time, tailors the offers made to Owner-Operators and their second-seat drivers based on established preferences the Owner-Operators communicate to dispatchers.[54] In fact, Owner-Operators are free to accept or reject loads "sitting on a couch at home."[55]

Overwhelming evidence also demonstrates that Owner-Operators and their drivers have the freedom to reject loads offered to them by XPO.[56] They can reject loads not to their liking,

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[50] Alvarez: 1161:25 - 1162:12 (Usually does twenty loads a week, but has done as many as fifty and as few as six).
[51] Dominguez: 1485:4-10 (Chooses to start his day around 4 a.m. to avoid traffic); Alvarez: 1160:22-25 (Chooses to work during the week, but has the ability to work on weekends if he wants); Aldrete: 1282:18 - 1283:10 (Chooses to drive nights because of less traffic and fuel savings); XPO Exh. 133.
[52] Freeman: 256:10-24.
[53] Freeman: 257:15-18.
[54] Limuaco: 557:24 - 559:1 (Owner-Operators communicate their load preferences to XPO dispatch, and are able to reject any load via "either text or call").
[55] Limuaco: 565:2-5.
[56] Banales: 1520:21-23 (Drivers can reject loads); Vasquez: 1302:8-11 (Drivers can refuse loads)

Ramirez: 1410:23-1411:4 (Drivers are free to accept or reject loads and can do so without visiting the XPO terminal); Alvarez: 1124:5-17 (Drivers can choose which types of loads to accept); Aldrete: 1219:24 -1220:11 (You can refuse work that is offered, and he has personally

including, for example, for customers of XPO that they choose not to serve and routes they prefer not to drive, loads that they do not believe are financially worthwhile, and loads that require going over scales or involve other delays.[57] In fact, the right to turn down work is an express term of the ICOC.[58] When such rejection happens, Owner-Operators and their drivers are not penalized in any way.[59] They are offered other available loads, which they can similarly accept or reject.

Once an Owner-Operator or driver has accepted a load, he is in control of the load and the manner of delivery.[60] XPO's limited role is to provide the Owner-Operator with delivery information and the customer's timeframe.[61] Customer delivery windows differ. Some deliveries have set times, while others have 24-hour or multiple-day windows.[62] Whatever the customer requirement, it is the Owner-Operators who determine the best method to timely complete their

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done so at least five or six times in the past year); Aldrete: 1280:15-19 (You are free to refuse loads); Freeman: 254:14 - 256:8 (Owner-Operators choose which loads to accept and can opt out of taking a load if something comes up, like a personal emergency); Freeman: 503:6-23 (A driver may reject a load even after they have told XPO that they will take that load, which has happened dozens of times at the Commerce terminal); Darling: 182:4-12 (XPO offers loads through an app, and drivers are free to accept or reject loads; loads are not assigned);

West: 759:20 - 760:17 (You have the ability to accept or reject loads, with no consequences for rejecting loads); Naemo: 817:2-4, 857:21-25 (You have the ability to accept or reject any loads offered, which is part of the flexibility of being an independent contractor); Moore: 838:13 - 839:25 (You have the ability to accept or reject any loads offered).

[57] XPO Exh. 133.
[58] XPO Exh. 13 at Section 4(D) (No Forced Dispatch or Volume Commitments).
[59] Zouri: 891:19-21 (He feels comfortable rejecting loads); Freeman: 522:14 - 523:12 (Drivers face no consequences if they reject a load); Limuaco: 557:12-20 (Drivers can reject loads, and will then be offered the next load available); Limuaco: 559:19-23 (There are no consequences for drivers that reject loads).

[60] XPO Exh. 13 at Section 10(A).
[61] Avalos: 1026:3-10 (XPO offers the opportunity to receive loads any time of the day, seven days a week).
[62] Limuaco: 578:6-17 (Explaining the difference between hard and open appointments); XPO Exh. 135.

deliveries.[63] As a result, Owner-Operators may make multiple deliveries in what they determine is the most efficient and profitable manner.[64] While performing this work, Owner-Operators and their drivers are completely free to make meal and rest stops and to choose the route they take to their destination.[65]

In the performance of their deliveries, the Owner-Operators function with independence from XPO.[66] That is a necessary characteristic of delivery work that is performed away from XPO's terminal. Interactions between Owner-Operators or their drivers and XPO's terminal staff are limited to sharing the basic information needed to complete the load, such as where to pick up the load and where to deliver it.[67] XPO uses its Rail Optimizer electronic platform and the Intermodal Fleet application to communicate this information to Owner-Operators and second-seat drivers and does not require them to start from or return to terminals for dispatches.[68]

Significantly, the Owner-Operators and their second-seat drivers, unlike XPO employees, are not subject to XPO's employee rules and policies.[69] Nor are they subject to any performance reviews, discipline, evaluations, audits, or ride-alongs. The limited oversight XPO does perform is safety-related as required by law, such as removal from service for certain conditions.[70]

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[63] Freeman: 341:5-11 (XPO does not determine the route a driver takes after accepting a load).
[64] Freeman: 300:11 - 301:13 (XPO offers Owner-Operators the freedom to choose their own schedule, which is appealing to the Owner-Operators who are running their own businesses).
[65] XPO Exh. 13 at Sections 4(A)(1) and 11(A).
[66] Freeman: 341:5-11 (XPO does not determine the route a driver takes after accepting a load).
[67] Limuaco: 13-21 (Fewer Owner-Operators and second-seat drivers come to the XPO terminals because Rail Optimizer and the Intermodal Fleet app have digitized the dispatch experience); Dominguez: 1468:8-11 (Receives dispatch offers on the ELD and via text).
[68] Darling: 109:1-10 (The Intermodal Fleet app has fully digitized the dispatch experience); Limuaco 565:2-12 (Drivers can "sitting on a couch at home . . . accept or reject a load.")
[69] *See* Freeman: 376:4-9 (XPO's transfer policy applies to employees working at the terminals).
[70] Dominguez: 1502:15 - 1503:1 (Safety regulations apply regardless of who you are driving for); Freeman: 539:10-24 (XPO places drivers out of service for safety violations because those violations can result in fines or poor public safety ratings for XPO as the motor carrier).

6. Owner-Operators Obtain Their Own Operating Authority or Establish a Corporate Identity Under Which to Do Business

Owner-Operators have the option to incorporate their businesses or form limited liability companies, and many do.[71] The record reflects that 32 Owner-Operators operating out of Commerce, and 48 operating out of San Diego formed business entities.[72] Owner-Operators also have the ability to obtain their own Department of Transportation Operating Authority, which they can choose to utilize when they are not hauling freight for XPO.[73] Fifteen Owner-Operators operating out of Commerce, and 19 operating out of San Diego have their own operating authority.[74]

7. XPO Compensates Owner-Operators as Independent Contractors

Owner-Operators do not receive an hourly rate and are not guaranteed any revenue from XPO.[75] Rather, on a weekly basis, XPO compensates Owner-Operators pursuant to the ICOC and its Schedule B based on the type of delivery, the distance traveled in miles, and any premiums the Owner-Operators negotiate for transporting a particular load.[76]

While the ICOC includes the basic terms of compensation, the Owner-Operators can and do negotiate changes to their compensation.[77] In many cases involving deliveries that cannot be handled in the normal course, on-the-spot negotiations occur which lead to higher rates for these

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[71] Aldrete: 1250:21-23, 1582:12-16 (Chose to form an entity: R&M Trucking Express); Vasquez: 1331:19-23 (Formed his own company; J.V. Trucking); Alvarez: 1162:25 - 1163:5 (Could form an entity if he chose to).

[72]XPO Exhs. 52-83 (Articles of Incorporation and Articles of Organization for Commerce Owner-Operators), 84-131 (Articles of Incorporation and Articles of Organization for San Diego Owner-Operators).

[73] Vasquez: 1338:6-9 (He could use his own DOT authority to drive for other companies).

[74] XPO Exhs. 17-31 (DOT authority for Commerce terminal Owner-Operators); Exhs. 33-51 (DOT authority for San Diego terminal Owner-Operators).

[75] XPO Exh. 13 Section 12.

[76] XPO Exh. 13 at Section 2; XPO Exhs. 6, 7.

[77] XPO Exhs. 6, 7 at Section 2: "Changes In Fees."

deliveries.[78] These "unplanned premiums," which are paid above the rates offered in Schedule B are a regular occurrence.[79] Ultimately, the unplanned premium amounts paid on any given route or "lane" are considered and factored into the new Schedule B rates that are offered when the subsequent iteration of Schedule B is introduced at each terminal.[80]

Other than to ensure compliance with federal regulations, Owner-Operators' and second-seat drivers' hours are not tracked.[81] Rather, they are paid weekly settlements based on proof-of-delivery documents.[82] Owner-Operators also are paid flat fees for tasks such as tying down loads with chains, blanketing loads, making extra stops, making a chassis flip, making a chassis split, or cleaning out containers.[83] Owner-Operators are paid for waiting time at a rate in 15-minute increments if they wait at a customer site for more than one hour to make a delivery.[84]

Consistent with their work and payment as independent contractors, XPO does not provide Owner-Operators with any benefits or insurance, nor does XPO withhold any taxes from their payments.[85] While XPO will make payments on behalf of Owner-Operators for some

[78] Naemo: 816:4 - 817:1 (There is an opportunity to negotiate the rates paid for any particular load).
[79] Pet. Exh. 289; Pet. Exh. 290; Freeman: 507:11 - 508:10 (Unplanned premiums are determined at the terminal level through a discussion between the dispatcher and the driver, where the dispatchers have the ability to offer compensation in excess of the amount listed on Schedule B); Yabio: 1446:12-14 (Has received premiums for taking certain loads); Avalos: 965:18 - 966:3 (Drivers are told the client name, length of the trip, geographic location, how much they will be paid, and whether a premium applies when receiving dispatch offers); Avalos: 967:18-25 (Premiums are offered for loads that require urgent delivery or specific instructions, and premiums can run up to $500).

[80] Schedule B rate increases are determined at the individual terminal level. XPO Exh. 138 (Example of how Schedule B is changed).
[81] Freeman: 482:13-21 (Hours of service are recorded in the electronic logging devices on the trucks in order to comply with Federal Motor Carrier hours of service regulations).
[82] Pet. Exhs. 224, 268.
[83] XPO Exhs. 6, 7.
[84] Freeman: 342:21 - 343:5 (XPO pays Owner-Operators for waiting at a customer site).
[85] XPO Exh. 13 at Schedule N(2).

expenses, those payments are made only upon request of the Owner-Operators and funded entirely by the them through deductions.[86]

As a result of all these variables in compensation, and the ability to manage expenses, compensation among Owner-Operators is directly linked to their entrepreneurial efforts. The highest-earning Owner-Operator in 2021 earned over $680,000, and others earned similarly considerable sums.[87] On the other end of the spectrum, some Owner-Operators earn less,[88] and in between, there are numerous Owner-Operators who made over $100,000 in a given year.[89] This is largely a function of how many loads an Owner-Operator chooses to have their trucks and drivers carry.[90] One example worth noting is that of Mr. Alvarez, who works around his school schedule and worked his way up from being a second-seat driver to being an Owner-Operator.[91]

D. Second-Seat Drivers Do Not Have A Contractual Or Employment Relationship With XPO

XPO has contractual agreements only with Owner-Operators. Second-seat drivers do not and have never executed ICOCs with XPO.[92] These drivers sign only Schedule K to the Owner-Operators' ICOC with XPO, confirming their contractor status.[93] XPO does not dictate their

[86] XPO Exh. 13 at Schedule N(2), N(4).
[87] XPO Exh. 137; Limuaco: 627:16 - 628:6, 630:18-25 (Steve Zouri, an Owner-Operator operating out of the San Diego terminal, started with two trucks and now has four trucks, and earned $680,350.91 in 2021); Vasquez: 1348:7-9 (Earned $315,000 in 2021);

[88] XPO Exh. 137.
[89] XPO Exh. 137; Ramirez: 1413:14 - 1414:7 (Earned $143,000, $120,000, and $149,000 in 2019, 2020, and 2021, respectively).
[90] Alvarez: 1161:25 - 1162:12 (Usually does twenty loads a week, but has done as many as fifty and as few as six).
[91] Alvarez: 1148:5-20, 151:1 - 1153:10; *see also* Avalos: 1041:9-11 (Chose to take three weeks off in January 2020); Alvarez: 1162:19-24 (Has taken up to six weeks off).
[92] XPO Exh. 13; Limuaco: 620:11-20 (Unlike Owner-Operators, second-seaters do not execute the entire independent contractor operating agreement).
[93] XPO Exh. 13 at Schedule K. Freeman: 402:25 - 403:3 (Unlike Owner-Operators, second-seat drivers do not receive the full independent contractor operating agreement).

hours or pay nor do these drivers receive any compensation from XPO.[94] In fact, only Owner-Operators receive a 1099 tax form from XPO; second-seat drivers do not.[95]

Rather, second-seat drivers have a contractual or employment relationship with their Owner-Operators. The evidence shows that Owner-Operators enter into independent-contractor agreements with their second-seat drivers and that the Owner-Operators are the ones who provide their drivers with 1099 tax forms.[96] Owner-Operators set the compensation for these drivers.[97] Second-seat drivers also exercise the ability to negotiate pay rates from Owner-Operators.[98] Indeed, despite perceptions among certain second-seat drivers that there is a set level of pay for second-seat drivers, there is a range in the second-seat drivers' payment terms, none of which is controlled by, or even known to, XPO.[99]

E. The Operations At XPO's Commerce And San Diego Facilities Are Separate and Distinct

Significantly, the San Diego and Los Angeles areas are sufficiently distinct that two different Teamster Local Unions exist in the two areas: Teamsters Local 848 is located near

[94] Freeman: 307:25 - 308:5, 366:12-15 (XPO does not send 1099s to second-seaters because it does not pay second-seaters); Banales: 1535:25- 1536:4 (Received a 1099 from each Owner-Operator he has driven for); Naemo: 811:11-14 (Receives a 1099 from the Owner-Operator he drives for at years end).

[95] Alvarez: 1147:15-25 (As a second-seater, received a 1099 from the Owner-Operator he drove for); Alvarez: 1151:4-6 (Now as an Owner-Operator, he receives a 1099 from XPO).

[96] Aldrete: 1274:6 - 1275:11 (XPO sends him a 1099 annually, and he sends his second-seat drivers forms 1099); Avalos: 1013:14-19, 1015:21-25, 1016:1-3 (As a second-seater, he receives a 1099 from the Owner-Operator, which he uses to prepare his taxes).

[97] Dominguez: 1509:5-9 (XPO does not dictate how much Owner-Operators pay their second-seaters); Ramirez: 1368:11-17 (XPO has no control over the remuneration paid to second-seat drivers by the Owner-Operators).

[98] Dominguez: 1499:20-23 (Discussed how much he would be paid with the Owner-Operator he works for); Banales: 1536:5-20 (He earned different rates depending on which Owner-Operator he drove for, and he could earn more if he delivered loads in a certain area).

[99] Banales: 1536:5-20 (He earned different rates depending on which Owner-Operator he drove for, and he could earn more if he delivered loads in a certain area).

Commerce (with its main office in Long Beach, CA); and Teamsters Local 542 is located in San Diego. Nonetheless, the petitioned-for unit inappropriately seeks to combine Owner-Operators and their second-seat drivers from two entirely separate terminal operations in these areas that are approximately 130 miles apart. Beyond mere geographic separation, the facilities are managed and operated separately, including having (1) different hours of operation; (2) different support staff; and (3) separate dispatch, recruiting, and onboarding functions.[100] There is no shared involvement with the day-to-day activities of the Owner-Operators or their second-seat drivers at the two facilities.[101] The San Diego and Commerce terminals vary greatly in how they operate, including the number of hard and open appointments, average haul length, premiums paid above Schedule B, and compensation for wait time and scale stops.[102] Each site has a Terminal Leader with full operational oversight for their facility and responsibility over separate profit and loss statements.[103] Further oversight of terminal operations in San Diego and Commerce occurs only at the level of the Regional Vice President of XPO intermodal

[100] Freeman: 236:8 - 237:12 (The San Diego and Commerce terminals have different hours of operation because they service different customers); Freeman: 219:17 - 220:12 (The Commerce terminal has a much larger support staff because it services more than 800 unique destinations, while the San Diego terminal's smaller support staff focuses on servicing two main customers); Freeman: 238:21 - 239:16 (The dispatch boards at the San Diego and Commerce terminals are separate); Freeman: 238:11 - 248:22 (Recruitment of drivers is done separately between the San Diego and Commerce terminals, as are onboarding efforts); Limuaco: 568:18 - 569:1 (The San Diego terminal has a smaller staff of planners and dispatchers than the Commerce terminal because it serves a particular customer base).

[101] Darling: 128:18 - 130:6 (The support staff at the Commerce and San Diego terminals are different, with San Diego having a much smaller support staff)

[102] XPO Exh. 135 (Slides comparing operations at the Commerce and San Diego terminals); Pet. Exh. 289.

[103] Limuaco: 584:11-16 (The San Diego terminal maintains its own profit and loss statements and budget); 606:2-5, 607:1-5 (The San Diego and Commerce terminals maintain separate profit and loss statements).

operations.[104] The same Regional Vice President also has operational oversight over other West Coast intermodal facilities.[105] In addition, there is little to no interchange between Owner-Operators servicing the San Diego and Commerce locations.[106] San Diego serves mostly the just-in-time inventory of a single automotive industry customer in Mexico, while Commerce serves a varied customer base in the greater Los Angeles area.[107]

III. LEGAL STANDARD

A. The Independent Contractor Versus Employee Analysis

The Board is bound to apply the common law agency test to determine whether a worker is an employee or an independent contractor under the Act. *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968).[108] This inquiry involves the application of the nonexhaustive common-law factors enumerated in the Restatement (Second) of Agency §220 (1958):

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[104] Darling: 88:18 - 91:18 (XPO's West Coast region consists of six independently operated terminals, each with their own terminal leader, onsite team, Schedule B, and pool of drivers); XPO Exhs. 1, 2.

[105] *Id.* Tibbetts: 35:22-37:18; XPO Exhs. 1, 2, 4.

[106] Yabio: 1451:1-3 (Although he does some local loads in Los Angeles, he receives dispatches from San Diego); Banales: 1531:9-15 (Only receives dispatches from the San Diego terminal); Samayoa Rosales: 1433:4-10 (The Commerce and San Diego terminals have separate dispatch systems); Alvarez: 1151:16-25, 1168:14-16 (He signed the Commerce terminal Schedule B because that is where he chose to receive dispatches from; he never signed the San Diego Schedule B).

[107] Darling: 91:19 - 92:9 (The San Diego and Commerce terminals serve different customer bases); Darling: 127:5-16 (About ninety percent of the San Diego terminal's customers are cross-border customers. The Commerce terminal dispatches loads to almost fifty different locations in a given day); Limuaco: 591:25 - 592:12 (The San Diego terminal primarily services one customer, which accounts for approximately ninety-five percent of the terminal's work); 606:19 - 607:1 (The San Diego and Commerce terminals maintain separate books of business from each other).

[108] Section 2(3) of the National Labor Relations Act provides that the term "employee" shall not include "any individual having the status of an independent contractor." 29 U.S.C. § 152(3).

> (a) The extent of control which, by the agreement, the master may exercise over the details of the work.
>
> (b) Whether or not the one employed is engaged in a distinct occupation or business.
>
> (c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
>
> (d) The skill required in the particular occupation.
>
> (e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.
>
> (f) The length of time for which the person is employed.
>
> (g) The method of payment, whether by the time or by the job.
>
> (h) Whether or not the work is part of the regular business of the employer.
>
> (i) Whether or not the parties believe they are creating the relation of master and servant.
>
> (j) Whether the principal is or is not in business.

Over the years, the Board's application of these common law factors has resulted in substantial clarification (and, often, rejection of the Board's approach) by the courts of appeals, especially in D.C. Circuit. Thus, in *FedEx I*, the D.C. Circuit disagreed with the Board's analysis and application of the common law factors, and the court emphasized that the inquiry must focus substantially on the entrepreneurial opportunity available to service providers, including their potential for profit or loss, rather than focusing indiscriminately focusing the extent of "control." *FedEx Home Delivery v. NLRB,* 563 F. 3d 492, 497 (D.C. Cir. 2009) ("while all the considerations at common law remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is whether the position presents the opportunities and risks inherent in entrepreneurialism").

Subsequently, the Board in *FedEx II* discounted the importance of "entrepreneurial opportunity" by finding that it represented merely "one aspect of a relevant factor that asks whether the evidence tends to show that the putative contractor is, in fact, rendering services as part of an independent business." 361 NLRB 610, 620 (2014). This prompted the D.C. Circuit to reject the Board's position a second time in *FedEx II*, where the court once again held that the Board did not properly apply the common law test, and consistent with *NLRB v. United Insurance Company of America*, 390 U.S. 254, 260 (1968) the D.C. Circuit reiterated that the Board had "no special administrative expertise" warranting deference regarding these issues. *FedEx II*, 849 F.3d at 1127-28 (citation omitted).

The Board subsequently issued *SuperShuttle DFW, Inc.*, which – consistent with *FedEx I* and *FedEx II* – upheld the appropriateness of having questions regarding independent contractor status resolved by evaluating common-law factors "through the prism of entrepreneurial opportunity. . . ." . 367 NLRB No. 75, slip op. at 9 (2019). The Board found in *SuperShuttle* that "entrepreneurial opportunity is not an independent common-law factor," but rather "a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain." *Id.* at 9. The Board has since issued three other decisions on how the common-law factors need to be evaluated through the prism of entrepreneurial opportunity. *Velox Express, Inc.*, 368 N.L.R.B. No. 61, slip op. at *1 (2019); *Intermodal Bridge Transport*, 369 N.L.R.B. No. 37, slip op. *1 (2020); and *Nolan Enterprises, Inc. d/b/a Centerfold Club*, 370 N.L.R.B. No. 2, slip op. *1 (2020). The analysis is focused on discretion, rather than action. *See SuperShuttle*, 367 N.L.R.B. No. 75 at *12-13; *Intermodal Bridge Transport*, 369 N.L.R.B. No. 37 at *2 (determining employment status by analyzing

whether drivers had discretion, not whether discretion was exercised); *Velox Express, Inc.*, 368 N.L.R.B. No. 61 at *3-4 (same).

B. The Standard For Determining An Appropriate Bargaining Unit

Section 9(b) of the National Labor Relations Act ("NLRA" or "Act") mandates that the Board must determine what constitutes an appropriate unit "in each case." 29 U.S.C. § 159(b). Although nothing in the Act requires the unit for bargaining to be the only appropriate unit or the most appropriate unit, the Act requires that the unit for bargaining be appropriate so as to assure employees the fullest freedom in exercising the rights guaranteed by the Act. *See Overnite Transp. Co.*, 322 NLRB 723, 726 (1996); *Brand Precision Serv.*, 313 NLRB 657, 658 (1994); *Phoenix Resort Corp.*, 308 NLRB 826, 828 (1992). A bargaining unit is inappropriate where the petitioned-for employees lack a significant community of interest. In *PCC Structurals*, the Board announced its return to the "community of interest" standard when evaluating the appropriateness of a petitioned-for bargaining unit. *PCC Structurals,* 365 NLRB No. 160, at 7 (2017). Under this standard, consideration is given to "both the shared and distinct interest of petitioned-for and excluded employees." *Id.* at 11. In 2019, the Board refined this standard and announced a three-step process to determine whether the petitioned-for and excluded employees share a community of interest. *See The Boeing Company*, 368 NLRB No. 67, at 3 (2019). First, it must be determined whether the proposed unit shares an internal community of interest. Second, the interest of those within the proposed unit and the shared and distinct interests of those excluded from that unit must be comparatively analyzed and weighed. Third, consideration must be given to the Board's prior decisions on appropriate units in the particular industry involved, if any exist. *Id.* at 3-4. The burden of demonstrating whether a petitioned-for unit is appropriate falls upon the petitioning party. *Id.* at 2.

The Board has provided several factors to consider when determining whether the interest shared by the petitioned-for employees are too disparate to form a community of interest within the petitioned-for unit. Accordingly, consideration must be given to whether the petitioned-for employees: (1) are organized into a separate department; (2) have distinct skills and training; (3) have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap; (4) are functionally integrated with the employer's other employees; (5) have frequent contact with other employees; (6) interchange with other employees; (7) have distinct terms and conditions of employment; and (8) are separately supervised. *Id.* at 2 (*citing PCC Structurals*, 365 NLRB No. 160, at 5 (2017)).

In *Boeing*, the Board determined that the petitioned-for unit which included two classifications of employees at the employer's single plant was not an appropriate unit. *Id*. at 1. The Board found that the two classifications of employees belonged to separate departments, did not share any supervision, had fundamentally different job functions from one another, and that there was no interchange between the two classifications. *Id.* at 4-5. These factors outweighed the similarities between the two job classifications, including their shared identical terms and conditions of employment, the frequent daily contact between the two classifications, and the shared set of skills and training between the two classifications. *Id.*

IV. INDEPENDENT CONTRACTOR VERSUS EMPLOYEE STATUS

A. Classifying Owner-Operators As Independent Contractors Is A Practical Result Of XPO's Intermodal Transportation Operations

XPO's intermodal transportation operations move customer cargo using two modes of transportation: railway and tractor trailers. Intermodal transport is an alternative to faster "over-the-road" long-haul trucking; slower to deliver freight provides a less-expensive option.[109]

[109] Tibbetts: 49:3-50:4.

Tractor trailers transport cargo a short distance by road, typically from a port or warehouse to a railyard, where the cargo is loaded onto a railcar and moved via railway near to its final customer destination.[110] To cover this initial truck-based portion of the journey, XPO engages the services of Owner-Operators, whether individuals or corporate entities.[111]

The record evidence also shows that in the intermodal business, the Owner-Operators provide only a limited portion of the overall transportation services needed to move the freight owned by XPO's customers.[112] The entire intermodal move contains a long-haul rail move that is bookended by two local short-haul truck moves. Because the Owner-Operators are providing services that constitute a small piece of a much larger move, the nature of their business prevents them from negotiating with XPO's myriad customers. It is not possible for Owner-Operators to negotiate directly with the cargo owners in the intermodal business because they do not have contracts with railroad providers as XPO does, nor do they have the ability to organize trucking services thousands of miles away at the other end of the move. Thus, the Owner-Operators are bidding for a small piece of a bigger move that is paid separately from what the customer pays XPO.[113]

XPO's model recognizes and capitalizes on the opportunity of establishing a mutually-beneficial arrangement between Owner-Operators and a company that commands access to a large customer base. In this regard, companies like XPO are the Owner-Operators' customers, and each operates a different business. A large, highly-skilled, pre-qualified pool of independent Owner-Operators in the trucking business already exists in the marketplace that does not have

[110] As discussed above, there is another truck move at the other end of the overall move that is not dispatched out of either the Commerce or San Diego terminals.
[111] Tibbetts: 50:19-51:8.
[112] Tibbetts: 43:9-46:1; XPO Exh. 3 (Example of Intermodal Move).
[113] Tibbetts: 43:9-46:1; XPO Exh. 3 (Example of Intermodal Move).

access to the volume of available work that XPO's logistics business makes available.[114] Once these business relationships are properly understood, it is readily apparent that the Owner-Operators have extensive interaction with their own customers: XPO and similar companies. They are thus not operating in the same business.

Any focus on contact with XPO's customers, moreover, is inconsistent with Board law. In *Dial-a-Mattress* the contractor delivery drivers at issue were found to be independent contractors even though they did not set prices or cultivate mattress customers. *Dial-a-Mattress Operating Corp.*, 326 N.L.R.B. 884 (1998). Similarly, in *The Arizona Republic*, the Board found that newspaper carriers were independent contractors despite a lack of direct contact, such as billing, extending credit, and collecting payments with newspaper subscribers. 349 N.L.R.B. at 1043. Very simply, the absence of contact by Owner-Operators and second-seat drivers with the customers of XPO does not carry significant weight.

B. Under Any Application Of The Common Law Factors, The Owner-Operators And Second-Seat Drivers Are Not XPO's Employees

Whether viewed under the Board standard applied in *FedEx II* or the standards applied by the D.C. Circuit in *FedEx I* and *FedEx II* and by the Board in *SuperShuttle*, it is clear that the Owner-Operators and second-seat drivers providing services at XPO's Commerce and San Diego facilities are independent contractors and, thus, fall outside the Board's jurisdiction under the Act. In fact, the second-seat drivers are even further removed from any purported employment relationship with XPO because the Owner-Operators hire them and set their compensation and other terms and conditions of work.[115]

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[114] Tibbetts: 52:21-53:23.

[115] Vasquez: 1308:11-13, 18-23 (Currently has two second seat drivers, including his friend Mario Cevallos, who Mr. Vasquez recruited to drive his truck); Ramirez: 1368: 11-17 (XPO has no control over the remuneration paid to second seat drivers by the owner-operators);

C. The Owner-Operators and Second-Seat Drivers Exercise Significant Control Over Their Work Relationship With XPO

The Owner-Operators and second-seat drivers providing services at XPO's Commerce and San Diego facilities are independent contractors because they maintain significant control over whether, when, where, and how long to work. *See FedEx II*, 361 NLRB 610, 619 (2014). Owner-Operators accept or reject whichever jobs they choose without fear of repercussions, and maintain total autonomy over what days, what specific hours, and the number of hours they will work.[116] XPO does not assign Owner-Operators shifts, nor does it define the geographic region in which they work.[117] Unlike the drivers at issue in FedEx, XPO does not direct the work of the Owner-Operators in any meaningful way, nor does XPO prevent the Owner-Operators from engaging in independent business. For example, Owner-Operators have the freedom to—and do—hire second-seat drivers.[118] They also have the ability to—and do—provide services to XPO's direct competitors. *Id.* at 627. Similar to the franchisees in *SuperShuttle*, the Owner-Operators engaged by XPO have "total control over their schedule, they work as much as they choose, when they choose[,]" and have the geographic freedom to choose where they work.

Dominguez: 1496:3-15 (He stopped driving for one owner-operator because he did not want to work under the conditions set by that owner-operator).

[116] Drivers are able, and do, tell XPO's dispatch when they want to work, and what types of loads they want to take. XPO Exh. 133 (Drivers specifying when they want to work and what loads they want to take); Naemo: 857:21 - 858:1 (Can choose which days to work and when to take vacation); Samayoa Rosales: 1430: 19-22 ("I can do movements whenever I want."); Avalos: 1049:5-7 (Chooses when to take vacation).

[117] Freeman: 256:9-24 (Owner-operators do not have shifts, and how much they work depends on each individual owner-operator's entrepreneurial drive); Naemo: 860:9-23 (You are free to choose which days you want to work and when you want to start or stop working); Avalos: 1026:3-10 (XPO offers the opportunity to receive loads any time of the day, seven days a week); Alvarez: 1157:1 - 1158:21 (Drivers doing work at the ports have to work around the port schedules, which have limited operating hours that are not set by XPO).

[118] Aldrete: 1202:2-6 (Currently employs one second seat driver); Vasquez: 1308:11-13, 18-23 (Currently has two second seat drivers, including his friend Mario Cevallos, who Mr. Vasquez recruited to drive his truck); Ramirez: 1409:6-8 (Made the decision not to hire a second seat driver).

SuperShuttle, 367 NLRB No. 75, at 12 (2019). Moreover, XPO maintains no control over the relationship between the Owner-Operators and their second-seat drivers, including their pay and hours.[119]

1. Owner-Operators Have Total Autonomy To Decide Whether, When, Where, And How Long They Work

XPO does not dictate the work schedule of Owner-Operators or second-seat drivers, does not require them to work a set number of hours, and does not control when they choose to take days off from working, or how many days off they take.[120] Indeed, Owner-Operators never need to drive at all and can have second-seat drivers drive for them.[121] Unlike in *Intermodal Bridge Transport*, moreover, there are no "shifts" because XPO does not schedule start times, end times, or shifts for Owner-Operators or their drivers, nor even demand that those drivers report to the terminal to accept or reject work.[122] Indeed, while some contractors chose to park their trucks at the terminal because XPO offers (in Commerce, but not San Diego) safe, and free parking, contractors who do not chose to avail themselves of this option can go weeks or even months without appearing at the terminal.[123]

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[119]Limuaco: 570:1-10 (Owner-Operators can dictate what loads their second-seat drivers will receive from XPO dispatch); Zouri: 894:16-19 (What an owner-operator pays a second seat driver is between the owner-operator and the second seat driver; XPO is not involved); Aldrete: 1275:19 - 1276:18 (As an owner-operator, he determines whether the second seat drivers can drive his truck); Ramirez: 1368:11-17 (XPO has no control over the remuneration paid to second seat drivers by the owner-operators).

[120] West: 759:11-15 (As an owner-operator, you can choose your starting time and which loads you want to take); Naemo: 857:21- 858:1 (Can choose which days to work and when to take vacation); Zouri: 879:13-14 (Can choose his own schedule); Avalos: 1049:5-7 (Chooses when to take vacation); Samayoa Rosales: 1430:19-23 ("I can do movements whenever I want.").

[121] Limuaco: 542:20 - 543:3 (Describing an example of an Owner-Operator who was disqualified but still has second-seat drivers operate his trucks).

[122] Freeman: 256:9-24 (Owner-operators do not have shifts, and how much they work depends on each individual owner-operator's entrepreneurial drive).

[123] Freeman: 261:9-21 (The digitization of dispatch means Owner-Operators and their drivers do not need to come to the terminals to, for example, scan documents).

The Owner-Operators are not assigned to delivery regions. Rather, they can choose whether and where they want to work based on their geographic preferences or any other factors of their choosing.[124] There are thus no routes in which they can have a proprietary interest. Like in *SuperShuttle*, the Owner-Operators have "total control over their schedule, they work as much as they choose, when they choose[,]" and have the geographic freedom to choose where they work. *SuperShuttle*, 367 N.L.R.B. No. 75 at *12.

Moreover, Owner-Operators are free to provide services to other companies, including for direct competitors of XPO, or they can operate independently if they obtain their own DOT operating authority. For example, Owner-Operator Zouri, who dispatches out of the San Diego terminal, operates multiple tractors for XPO and another for a different carrier.[125] Notably, 34 Owner-Operators in Commerce and San Diego have their own operating authority and can choose to haul freight for themselves and not just for XPO. *FedEx II*, 361 N.L.R.B. at 637 ("the ability to work for other companies" governs); *FedEx I*, 563 F.3d 492, 497- 499 (D.C. Cir. 2009) (opportunity, and not practice, is controlling); *see also The Arizona Republic*, 349 N.L.R.B. 1040, 1045 (2007) (Board noting the existence of entrepreneurial opportunity despite the fact that most individuals did not exercise that ability, concluding that although "many [individuals]

[124] Alvarez: 1157:1 - 1158:21 (Drivers doing work at the ports have to work around the port schedules, which have limited operating hours that are not set by XPO); Aldrete: 1282:18 - 1283:10 (Chooses to drive nights because of less traffic and fuel savings); Dominguez: 1485:4-10 (Chooses to start his day around 4 a.m. to avoid traffic).

[125] Freeman: 258:10 - 259:1, 327:6-11 (Carlos Penilla is an Owner-Operator who runs loads for other companies, and has told XPO dispatch that he does so. Another Owner-Operator that formed the entity Safe Chem also turns down loads from XPO dispatch because he is running loads for another company. Further, Anton Perrira, an Owner-Operator operating out of Commerce, had his own authority and hauled for Nick's Trucking while under contract with XPO); West: 793:13-20 (The Owner-Operator he currently works for has his own authority and can do work for companies besides XPO); Zouri: 877:18-22 (Owns five trucks, one of which he operates with another company and not XPO).

choose not to take advantage of [the] opportunity to increase their income does not mean that they do not have the entrepreneurial potential to do so"); *C.C. Eastern, Inc. v. NLRB*, 60 F.3d 855, 860 (D.C. Cir. 1995) ("it is the worker's retention of the right to engage in entrepreneurial activity rather than his regular exercise of that right that is most relevant for the purpose of determining whether he is an independent contractor.").

2. Owner-Operators Exercise Autonomy Over the Work They Accept From XPO

Owner-Operators have broad discretion in determining whether to accept an assignment from dispatch. This allows Owner-Operators to weigh the cost of a particular trip in terms of distance, weight of the load (which impacts fuel compensation), and if a particular customer or location (such as at the Ports) has a reputation for wasting the Owner-Operator's time, all against the compensation received.[126] Here, the Owner-Operators are more akin to the franchisees in *SuperShuttle* who make a similar calculation in determining whether to accept or reject an assignment, and not the drivers in *Velox Express* and *Intermodal Bridge Transport* who had a limited ability to reject work. This ability to accept or reject loads is so absolute, that if none of the Owner-Operators who is available agrees to take on a particular move, XPO either has to reschedule the load with its customer or hire an outside company to move the freight.[127]

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[126] Freeman: 228:9-17 (Dispatchers must offer additional compensation above the Schedule B rate to cover one particularly undesirable load because of its end destination); Moore: 838:13 - 839:25 (You have the ability to accept or reject any loads offered); Zouri: 891:19-21 (He feels comfortable rejecting loads); Naemo: 817:2-4, 857:21-25 (You have the ability to accept or reject any loads offered, which is part of the flexibility of being an independent contractor); Alvarez: 1157:1 - 1158:21 (Drivers doing work at the ports have to work around the port schedules, which have limited operating hours that are not set by XPO); Aldrete: 1219:24 - 1220:11 (You can refuse work that is offered, and he has personally done so at least five or six times in the past year).

[127] Freeman: 524:2-7 (XPO utilizes "Core Carriers" that are compensated at a higher rate because of the additional expenses they incur related to licensing and maintaining their own DOT authority); Freeman: 523:16-23 (When there is a difficult load "either because of the route, the hills, the unloading conditions or time, and it's difficult to get contractors to take it . . . core

The manner of selection or rejection of loads reflects freedom, flexibility, and entrepreneurial opportunity for the Owner-Operators. Because Owner-Operators can select or reject loads at will, the testimony showed how important it was for the dispatchers working for XPO to know an Owner-Operator's preferences.[128] Dispatchers first acquired this knowledge during the introductions of new Owner-Operators and second-seat drivers to the dispatchers who try to learn an Owner-Operator or second-seat driver's preferences, what their needs are, and their preferred schedules, as well as any capabilities or licenses for handling special work outside of just local dispatch.[129]

Dispatcher knowledge about Owner-Operator preferences is critical because the dispatchers cannot require Owner-Operators to take loads. Dispatchers thus use this information when they have to dispatch undesirable loads.[130] If a dispatcher cannot get an Owner Operator to take a particular load, he can bundle the move together with other sufficiently attractive ones to get the Owner-Operator to accept the package of moves.[131] Whereas an incentive payment might enhance the deal for the Owner-Operator to take an individual load, bundling involves creating a package of multiple moves that an Owner-Operator could accept if it might make an undesirable move worth his or her while.[132]

[carriers] will typically take up to 100 percent of those."); Limuaco: 567:21 - 568:3 (Because XPO does not assign loads, it must turn to core carriers to cover loads that no Owner-Operators or second-seat drivers will take).

[128] Limuaco: 703:4-8 (One of the challenges with dispatching loads is that drivers can choose which loads to take and when to work).
[129] Limuaco: 558:10-25, 572:20 - 573:1 (Describing the preferences of some Owner-Operators and second-seat drivers, and how the San Diego facility has created a list of these preferences to cater dispatches to what the drivers want).
[130] Freeman: 228:1-17 (XPO dispatchers communicate with drivers to negotiate premiums for undesirable or difficult loads).
[131] Freeman: 309:19 - 310:4 (Dispatchers will package multiple loads together to help dispatch undesirable loads).
[132] *Id.*

Technological advancements since 2018 have facilitated the Owner-Operators' ability to accept or reject loads. Between 2018 and 2019, XPO updated its transportation management system into what is known today as Rail Optimizer. Part of this update included the development of a mobile application, Intermodal Fleet, which has fully digitized the dispatch experience.[133] With the Intermodal Fleet app, Owner-Operators and second-seat drivers can receive dispatches without going to an XPO terminal—they can thus accept or reject loads remotely, thereby enhancing flexibility.[134] Intermodal Fleet allows Owner-Operators and second-seat drivers to see loads offered by XPO dispatch on their mobile device, including the origin and destination point for that load.[135] Additionally, Intermodal Fleet will display information regarding the remuneration for the load, including for the amount of fuels charged, and any premiums offered.[136] All Owner-Operators can see the remuneration amounts, and so can second-seat drivers who have been authorized to do so by their Owner-Operator.[137] After completing a load, Owner-Operators and second-seat drivers can scan and submit the necessary paperwork through the Intermodal Fleet application.[138]

[133] Tibbetts: 39:2-39:25 (Between 2018 and 2019, XPO consolidated its transportation management system into Rail Optimizer and developed the Intermodal Fleet app).
[134] Tibbetts: 39:2-40:13; 41:1-41:12 (The Intermodal Fleet app digitized the dispatch experience); Limuaco: 560: 1-5, 565:2-6 (Drivers do not need to come to the terminal to receive loads); XPO Exh. 5 (Intermodal Fleet App Screenshots).
[135] Darling: 114:3-22 (Describing how the Intermodal Fleet app displays dispatches to Owner-Operators and second-seat drivers).
[136] Freeman: 530:12-20.
[137] Freeman: 530:12-20 (If the "view rates" button is enabled for a second-seat driver, then they can see the rate to be paid for that load).
[138] Darling: 172:7-14 (Drivers can submit all of their necessary paperwork through the app, without the need to come to a terminal and scan the documents).

3. Owner-Operators Have Extraordinary Opportunities to Increase Their Compensation Yet Also Risk Losses

There is a wide range in compensation among the Owner-Operators, which varies depending on many factors *e.g.*, number of deliveries, miles driven, number of trucks leased or owned, and the number of second-seat drivers the Owner-Operator utilizes to transport loads.[139] Other compensation factors include the willingness of the Owner-Operators to drive during hours when there is less traffic, whether they were willing to take some of the less desirable loads, and whether they have special endorsements like hazmat, which allows them to haul higher revenue loads.[140] Notably, however, Owner-Operators need not drive at all. In fact, XPO contracts with a number of individual Owner-Operators who either do not drive at all, or do so only minimally so as to stay qualified while leaving the bulk of the driving duties to second seaters they manage. Incorporated Owner-Operators, of course, provide all of their services through hired drivers.

By hiring second-seat drivers and operating multiple trucks, Owner-Operators can maximize their revenue per day, especially during the periods when an Owner-Operator is prohibited to work by federal regulation or just chooses not to work.[141] Because of federal hours of service regulations, an individual Owner-Operator can drive for only a certain maximum amount of hours per day if they choose to drive at all. *See generally* 49 C.F.R. § 395.3. If Owner-Operators have multiple trucks and hire drivers to work for them, they are able to

[139] Alvarez: 1163:22 - 1164:3 (Could purchase another truck and hire a second seat driver if he chose to); Aldrete: 1201:4-10 (Purchased a second truck to make more money); Dominguez: 1485:4-10 (If you "put in more hours", you can earn "more income").
[140] Freeman: 308:6-19 (XPO pays a premium for Hazmat loads to drivers who have chosen to obtain a Hazmat endorsement); Avalos: 967:18-25 (Premiums are offered for loads that require urgent delivery or specific instructions, and premiums can run up to $500); Alvarez: 1161:3-18 (Obtained a Hazmat certificate and has received premiums of up to $500 for driving Hazmat loads).
[141] Moore: 853:24-32 (Could make even more money by working more, hiring a second seat driver, and purchasing another truck).

exponentially increase their compensation, as demonstrated by Mr. Zouri, whose company, American Eagle Transportation, earned over $680,000 from XPO alone in 2021.[142] Omar Saib and Ali Aljibory are a father-son team that operate eight trucks with multiple second-seat drivers out of the San Diego terminal.

The compensation among Owner-Operators is directly linked to their entrepreneurial efforts. It is no accident that the highest-earning Owner-Operator earned over $680,000, while some Owner-Operators earned much less. In between those extremes are the majority of Owner-Operators who made over $100,000 in 1099 compensation.[143] *See Argix Direct, Inc*., 343 N.L.R.B. 1017, 1021 (2004) (the Board found it relevant that the Owner-Operators' gross payments "var[ied] greatly…from a low of $42,911.68 to a high of $92,129.77"). Unlike in *Velox Express*, 368 N.L.R.B. No. 61 at 3, where "[t]he drivers receive the same amount of compensation no matter what they do," the wide range in compensation alone shows that Owner-Operators at XPO do have actual significant potential for economic gain (or, conversely, risk of loss) through their own efforts and initiative.[144]

Economic risk is borne exclusively by the Owner-Operators. Their potential for losses due to the ICOC indemnity provisions weighs in favor of independent contractor status. In *SuperShuttle*, the Board considered the franchisee's requirement to indemnify and hold SuperShuttle harmless "against any and all liability for all claims of any kind or nature arising in any way out of or relating to the Franchisee's and Operator's actions or failure to act." *Id.* at 12. The indemnification weighs in favor of independent-contractor status because "[s]uch

[142] XPO Exh. 137.
[143] Driver pay can vary greatly, from $680,350.91 to $542.01. XPO Exh. 137 (1099 gross pay for period of 2017 to 2021).
[144] Freeman: 256:9-24 (How much an Owner-Operator makes depends on his or her entrepreneurial drive).

indemnification greatly lessens SuperShuttle's motivation to control a franchisee's actions, since SuperShuttle is not liable for a franchisee's negligent or intentionally harmful acts." *Id.* Here as well, the Owner-Operators indemnify XPO for various losses or damages that may arise during the performance of their services.[145]

Owner-Operators are also not guaranteed an income by XPO. *See Porter Drywall, Inc.*, 362 N.L.R.B. 7 (2015) (lack of guaranteed income favors independent contractor status). By example, the experience of Roni Naemo underscores the Owner-Operators' significant opportunity for profit and loss. Naemo had purchased his first tractor shortly before the pandemic hit.[146] When work dried up as a result, he was unable to maintain payments on his tractor and had to sell it.[147] He is currently a second-seat driver, but he aspires to again become an Owner-Operator and to own multiple trucks so that he can make more money.[148] What happened to Naemo is the epitome of economic risk, complete with the potential for new opportunity.

Conversely, every aspect relevant to generating that revenue is within the exclusive control of the Owner-Operators. It is the Owner-Operators who determine which and how many trucks to buy (and where to maintain and fuel them), the days and hours to operate the truck, or even whether to operate at all.[149] It is the Owner-Operators who decide which loads to take,

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[145] XPO Exh. 13 at Sections 1(A), 1(C), 6(A)(7), 6(A)(8), 20.
[146] Naemo: 806:14-19 (The timing of his truck purchase, during the pandemic, was not ideal).
[147] *Id.*
[148] Naemo: 808:23 - 809:17 ("I would love to be again as an owner operator to . . . [have] more time that I can save for future. And I could work harder and make some more money as an owner").
[149] Alvarez: 1148:5-20, 1152:22 - 1153:10 (Was able to go to school and work at the same time because he set his own schedule); Aldrete: 1213:4-8, 17-20 (Drivers receive texts from XPO dispatchers and respond with the dates and times they want to work the following week); Samayoa Rosales: 1430:19-23 ("I can do movements whenever I want.").

which to turn down, or which to delegate to second-seat drivers.[150] It is the Owner-Operators who decide whether to employ additional drivers, and in that way increase the time that their trucks are in productive use, rather than sitting idly.[151] It is the Owner-Operators who set the compensation for these second-seat drivers and determine when they will work.[152]

a. Owner-Operators Have Control Over Hiring Drivers To Perform The Contracted Services

XPO's contracts provide that Owner-Operators can provide one or more trucks and qualified drivers for them. This driver can, but is not required to be, the individual Owner-Operator, or the individual who owns the incorporated Owner-Operator.[153] Many Owner-Operators hire second-seat drivers to drive for them.[154] Moreover, Owner-Operators must compete for the services of second-seat drivers, and even if an Owner-Operator hires another driver, there is no guarantee that the arrangement will be successful.[155] Owner-Operators always face the potential of losing a second-seat driver to another Owner-Operator, and have to offer

[150] Freeman: 254:14 - 256:8 (Owner-operators choose which loads to accept and can opt out of taking a load if something comes up, like a personal emergency); West: 759:20 - 760:17 (You have the ability to accept or reject loads, with no consequences for rejecting loads); Banales: 1520:21-23 (Drivers can reject loads).
[151] Vasquez: 1308:11-13, 18-23 (Currently has two second seat drivers, including his friend Mario Cevallos, who Mr. Vasquez recruited to drive his truck); Ramirez: 1409:6-8 (Made the decision not to hire a second seat driver); Aldrete: 1578:6-13 (Has had approximately eleven second seat drivers during his time working with XPO).
[152] Aldrete: 1271:6 - 1272:8 (Owner-operators with second seat drivers are responsible for paying the second seat drivers; XPO does not determine how much an owner-operator pays his or her second seat driver(s)); Ramirez: 1368:11-17 (XPO has no control over the remuneration paid to second seat drivers by the owner-operators); Dominguez: 1509:5-9 (XPO does not dictate how much owner-operators pay their second seaters).
[153] XPO Ex. 13 at Section 1(A) (Discussing the equipment and personnel that the Owner-Operator will furnish to XPO in order to perform the services under the contract).
[154] XPO Exhs. 14, 15.
[155] Dominguez: 1496:3-15 (He stopped driving for one owner-operator because he did not want to work under the conditions set by that owner-operator); Banales: 1539:9-11 (He stopped driving for one owner-operator because that owner-operator hired a different second seat driver to drive his truck).

favorable compensation structures.[156] Crucially, however, XPO plays no role in setting second seat driver compensation, nor does XPO know what any particular driver is paid.[157] Of course, some Owner-Operators *choose* not to hire second-seat drivers or choose not to own multiple trucks.[158] Similarly, XPO has absolutely no control over whether the Owner-Operator hires a driver to carry loads for a different motor carrier.[159]

While XPO has to approve a second-seat drivers qualifications, that oversight is imposed by federal regulation. No Owner-Operator—or second-seat driver—can drive a commercial motor vehicle unless they complete and furnish to the federally regulated motor carrier an application meeting certain content requirements. 49 C.F.R. § 391.21. All XPO does is the legally required ministerial act of ensuring that second-seat drivers complete these forms consistent with federal and local regulations.[160] Complying with regulations cannot suggest employee status. *FedEx Home Delivery,* 563 F.3d at 501; s*ee SuperShuttle,* 367 N.L.R.B. No. 75 at *13 ("But these requirements are not evidence of SuperShuttle's control over the manner and means of doing business because they are imposed by the state-run DFW Airport"); *see also Don Bass Trucking, Inc.*, 275 N.L.R.B. 1172, 1174 (1985) ("Government regulations constitute supervision not by the employer but by the state.") (internal citations omitted);

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[156] *Id.*

[157] Zouri: 894:16-19 (What an owner-operator pays a second seat driver is between the owner-operator and the second seat driver; XPO is not involved); Ramirez: 1368:11-17 (XPO has no control over the remuneration paid to second seat drivers by the owner-operators); Aldrete: 1271:6 - 1272:8 (Owner-operators with second seat drivers are responsible for paying the second seat drivers; XPO does not determine how much an owner-operator pays his or her second seat driver(s)).

[158] Ramirez: 1409:6-8 (Made the decision not to hire a second seat driver).

[159] XPO Exh. 13 at Section 4(C) ("Except as restricted by Applicable Law (including 49 CFR Part 376), nothing in this Contract will prohibit Contractor from performing transportation services for other carriers, brokers or directly for shippers.").

[160] Freeman: 1572:14-19 (XPO's safety program mirrors the federal safety regulations).

XPO has ability, without affecting employment status, and sometimes an obligation, to insist that the Owner-Operator not use a particular driver who disrupts and interferes with XPO's dispatching operation.[161] Cal. Gov't Code § 12940(j)(1) ("An employer may also be responsible for the acts of nonemployees, with respect to harassment of employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract in the workplace, if the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action."). Moreover, the federal regulations also require XPO to examine the character of a driver, and XPO's refusal to allow an Owner-Operator to utilize a specific driver for XPO's customers is consistent with that mandate. 49 C.F.R. § 391.21 (located under Subpart C titled "Background and Character"); 49 C.F.R. § 391.67(b) (among various federal regulations defining Subpart C as "relating to disclosure of, investigation into, and *inquiries about* the background, *character*, and driving record of drivers."); 49 C.F.R. § 391.68(b) (emphasis added). The regulations thus presume that a motor carrier will be able to decide whether a particular driver may perform services for the motor carrier, regardless of whether a driver is an employee or an independent contractor.

b. Owner-Operators Are Able To Negotiate Their Compensation

The record is clear that Owner-Operators know that under certain circumstances they can negotiate for additional pay above and beyond what was set forth in the Schedule B of the ICOC.[162] The ICOC expressly contemplates such pay negotiations.[163] The on-the-spot pricing negotiations are not a "ruse" and do not "result[] in across-the-board pay increases for the drivers regardless of whether or not they 'negotiated' with [the putative employer]." *Intermodal Bridge*

[161] XPO Exh. 13 at Section 5(A).
[162] Pet. Exhs. 289, 290.
[163] XPO Exhs. 6, 7 (Schedule B at Section 2: "Changes In Fees").

Transport, 369 N.L.R.B. No. 37 at *2 n.6. XPO regularly has to negotiate with Owner-Operators and second-seat drivers in order to find a someone willing to take on a less desirable or urgent delivery.[164] Because the Owner-Operators have broad discretion to accept (or reject) assignments, this increased bargaining power in on-the-spot pricing negotiations results in individual Owner-Operators and drivers earning extra pay per load of $50, $100, and even $500, depending on the situation.[165]

Additionally, the Owner-Operators and second-seat drivers have the opportunity to turn these on-the-spot negotiations into more permanent increases in compensation on Schedule B to the ICOC, which is re-issued every 90 days. XPO regularly analyzes the unplanned premiums paid on a given route or lane and considers whether to incorporate the increased compensation demands of the Owner-Operators into the subsequent base offer for that lane on the next iteration of Schedule B.[166]

D. XPO Is Required By Law to Follow and Enforce Numerous Legal Regulations, Which Are Not Indicia of Control

XPO is required to "demonstrate it has adequate safety management controls in place, which function effectively to ensure acceptable compliance with applicable safety requirements to reduce the risk associated with: [multiple FMCSA violations]." 49 C.F.R. § 385.5; *see also id.* § 385.3 (defining "Safety management controls" as "the systems, policies, programs, practices, and procedures used by a motor carrier to ensure compliance with applicable safety and hazardous materials regulations which ensure the safe movement of products and passengers through the transportation system, and to reduce the risk of highway accidents and hazardous

[164] Freeman: 228:1-17 (XPO dispatchers communicate with drivers to negotiate premiums for undesirable or difficult loads).
[165] XPO Exhs. 11(a), 135; Alvarez: 1161:3-18 (Obtained a Hazmat certificate and has received premiums of up to $500 for driving Hazmat loads).
[166] XPO Exh. 138.

materials incidents resulting in fatalities, injuries, and property damage."). Federal regulations require motor carriers like XPO to ensure Owner-Operators comply with legal regulations. 49 C.F.R. § 390.11. If XPO does not comply with federal regulations, FMCSA may suspend or revoke XPO's motor carrier registration. *Id.* § 385.905(a). Accordingly, the following evidence, consistent with XPO meeting its government mandated safety obligations, has no bearing on the employee or independent contractor status of Owner-Operators and their second-seat drivers:

- XPO sets a maximum CSA score of 75 points and informs Owner-Operators and their second-seat drivers when they approach that threshold.[167]
- XPO maintains driver information and driving history.[168]
- Drivers cannot exceed hours of service requirements and XPO must track their hours.[169]

[167] Freeman: 473:2-24 (The CSA program stands for compliance, safety, and accountability and was part of the federal regulations implemented in 2010); Freeman: 483:5-11 (XPO provides notice to driver's who have accumulated many CSA points, but XPO does not counsel the drivers); CSA points are determined based on violations found during truck inspections, and contrary to the assertion of some witnesses proffered by the Union, are not calculated by XPO itself. XPO Exh. 140 (California Highway Patrol Driver/Vehicle Examination Report).

[168] Freeman: 1550:21 - 1551:1 (The safety regulations require motor carriers to keep records of drivers' information, including the drivers' driving history); 49 CFR § 391.11 (Drivers have to meet minimum driver qualifications); 49 CFR § 391.21 (Drivers have to fill out an application, which asks for their personal information, prior work history, references, DMV record, and driving history); 49 CFR § 391.25 (As the motor carrier, XPO must conduct an annual review of driver records).

[169] Freeman: 520:1-3, 529:14-25, 538:16 - 539:9 (The Federal Motor Carrier Safety Administration ("FMCSA") requires XPO to maintain hours of service logs for owner-operators and second seat drivers); Freeman: 1549:2-14 (The safety regulations include maximum hours of service, which must be recorded in an Electronic Logging Device); Freeman: 492:9 - 493:6 (The electronic logging device ("ELD") was required by the FMCSA in 2018); Freeman: 1550:10-13 (Drivers are required to keep a paper back-up logbook recording their hours of service); Freeman: 495:17-24 (Drivers must carry paper logs in case their ELD fails); Aldrete: 1263:11-24 (Hours of service violations are governed by federal law, and violations can result in points and fines); Avalos: 1063:18 - 1064:3 (The federal safety regulations require drivers to record their hours of service in an electronic logbook); Avalos: 1077:17 - 1078:12 (The logs that XPO sends drivers notices about are the same logs required under the federal safety regulations); 49 CFR § 395 et seq. (Drivers have to comply with hours of service limits): 49 CFR §§ 395.8;

- Drivers must undergo medical examination and drug tests.[170]
- Drivers must conduct a pre-trip and post-trip inspection.[171]
- Drivers must conduct 90-day inspections.[172]
- XPO requires drivers to maintain medical cards, registration, and insurance under the safety regulations.[173]
- XPO disqualifies drivers for speeding.[174]
- XPO provides drivers with a "Safety Matters" book.[175]
- Drivers must be covered by minimum insurance.[176]

395.22, 395.24 (Trucks must be outfitted with ELDs, and drivers must record their duty status and inspections using the ELD).

[170] Freeman: 1551:6-10 (Drug tests for drivers are required under the safety regulations); Avalos: 1058:8-25 (The Department of Motor Vehicles requires truck drivers to undergo both a biannual drug test and medical examination); 49 CFR § 382.301 (Drivers must participate in drug and alcohol testing); 49 CFR § 391.41 (Drivers must be medically certified as physically qualified to drive a truck).

[171] Freeman: 1551:25 - 1556:2 (The safety regulations require pre- and post-trip inspections); 49 CFR §§ 392.7, 396.11; 396.13 (Drivers must perform pre- and post-trip truck inspections).

[172] Freeman: 1554:14-17 (The State of California requires that motor carriers perform 90-day inspections); Avalos: 992:16-23 (90-day inspections and annual inspections are a Department of Transportation requirement); Cal. Veh. Code § 34505.5(a)-(b) (Trucks must undergo inspections every 90 days and any defects found must be repaired before the vehicles may be operated on the highway).

[173] Freeman: 1548:21-24 (Drivers are required to maintain medical cards, registration, and insurance under the safety regulations); Aldrete: 1187:19-22 (All commercial drivers, employees and independent contractors need a medical card); 49 CFR § 387.7 (A motor carrier must maintain proof of insurance at its principal place of business); 49 CFR § 391.51(a)-(b) (A motor carrier must maintain a driver qualification file for each driver operating under its authority, which includes vehicle registration, and a medical examiner's certificate for the driver).

[174] 49 CFR § 383.51, tbls. 1 & 2 (Drivers are subject to disqualification for committing felonies, speeding, and using hand-held mobile devices).

[175] Freeman: 305:15 - 306:15 (XPO's Safety Matters Handbook is based on federal and state regulations, and describes the safety program XPO is required to maintain under such regulations); Limuaco: 617:5-14 (The federal safety regulations require all motor carriers, including XPO, to maintain a safety program); 49 C.F.R. §§ 385.3, 385.5 (XPO must maintain safety management controls to ensure compliance with the applicable safety and hazardous material regulations).

[176] Freeman: 525:14-21 (There are minimum insurance requirements under the federal safety regulations, and customers may also set minimum insurance levels that a motor carrier must

- XPO provides optional safety updates.[177]

Each of these facts relates directly to safety, and regardless of the Owner-Operators' status an independent contractors or employees, XPO is required to ensure Owner-Operators comply with legal regulations and have adequate safety management controls in place.[178] *See* 49 C.F.R. §§ 385.5, 390.11; *see generally* 49 C.F.R. §§ 396.9 (requirements surrounding roadside inspections), 396.13 (requirements surrounding pre-trip inspections), 395 (requirements surrounding hours of service).

XPO's emphasis on safety does not support the Union's argument for employee status, even where XPO has instituted and enforced safety policies above what may be required under federal or state law.[179] Even if XPO's focus on safety concerns impacting Owner-Operators goes beyond the stated minimum requirements, they are still consistent with the FMCSA's regulatory scheme because the regulations establish only "the minimum qualifications for persons who drive commercial motor vehicles," and nothing in the regulations "shall be construed to prohibit an employer from requiring and enforcing more stringent requirements relating to safety of operation and employee safety and health." 49 C.F.R. §§ 391.1(a), 390.3(d); *see also* 49 C.F.R. § 390.5 (defining "employee" as "including an independent contractor while in the course of operating a commercial motor vehicle").

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maintain); 49 CFR §§ 387.3, 387.7 (a), 387.9 tbl. 1 (A motor carrier must maintain minimum levels of insurance for each motor vehicle operated under its authority).

[177] Freeman: 527:11 - 528:1 (Safety calls are still provided by XPO, but attendance for drivers is optional).

[178] Avalos: 1053:24 - 1054:6, 1055:6-11 (Federal safety regulations apply to drivers regardless of whether they are independent contractors or employees, including the requirement to pass a physical and drug screening).

[179] Freeman: 1572:14-19 (XPO's safety program mirrors the federal safety regulations); Freeman: 536:2 - 537:15 (XPO's safety program is more restrictive than the federal and state safety regulations in some respects because of the emphasis XPO places on safety).

Even if "advising" or "training" or any other practice related to safety may not be explicitly required by federal law, it all falls under the FMCSA regulatory regime's focus on maintaining "adequate safety management controls in place, which function effectively to ensure acceptable compliance with applicable safety requirements." *Id.* § 385.5. This also applies to any policy XPO had about disqualifying drivers for speeding or if they committed a series of other driving history-related infractions that may have been above what federal law requires. Finally, just because a policy or course of action is not explicitly mandated, the FMCSA regulations are not to be construed to "prohibit an employer from requiring and enforcing more stringent requirements relating to safety of operation and employee safety and health." 49 C.F.R. § 390.3(d). Thus, it is clear that nothing in the regulations prevents XPO from maintaining and enforcing any of the above safety policies.

The same rationale applies to the CSA scores. The federal CSA program tracks the safety performance of both drivers and motor carriers. Higher CSA scores are worse than lower CSA scores and are based on seven factors, and a change in the driver's CSA score can also impact the carrier's CSA score.[180] Enforcing a limit on CSA scores is part of the broader XPO effort to comply with safety regulations and is thus not reflective of employee status.[181]

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[180] CSA points are assessed as part of the FMCSA's Safety Measurement System and not by XPO. XPO Exh. 141 (CSA Factsheet); Freeman: 1555:17 (CSA is a federal program which involves assessing points for different safety violations, and XPO is not involved in assessing CSA points); Freeman: 473:11-24 (CSA scores demonstrate the level of risk in moving cargo with a particular motor carrier, which scores are actively monitored by customers); Freeman: 540:9 - 542:15 (CSA scores are assessed to motor carriers, are publicly available, and poor scores can impact customer relationships and a motor carrier's ability to operate).

[181] CSA points are not determined by XPO, and are communicated to XPO by the drivers after a violation has occurred or by a third-party vendor. XPO Exh. 139 (CSA points alert from TPI Technology); Dominguez: 1475:9-14 (Explains that CSA points are the result of violations with the California Highway Patrol).

E. The Owner-Operators Have Significant Entrepreneurial Opportunity

Beyond maintaining nearly complete control over the details of their own businesses, the Owner-Operators have significant opportunity for economic gain (or, conversely, risk of loss) through their own efforts and initiative.[182] The Owner-Operators at XPO's Commerce and San Diego facilities thus have significant entrepreneurial opportunity and are, therefore, independent contractors.[183] Second-seat drivers are employees of Owner-Operators.[184] Their economic opportunity derives from the Owner-Operator for whom they perform services.[185] *See SuperShuttle*, 367 NLRB No. 75, at 9 (2019). While XPO determines the proposed fee for a particular load, Owner-Operators have the ability to negotiate higher fees and, therefore, increase their opportunity for economic gain.[186] Moreover, negotiations over those premium rates are factored into XPO's quarterly reassessments of the rate schedules.[187] Because the Owner-Operators have significant "entrepreneurial opportunity" and "independence to pursue economic gain," it is clear that both the Owner-Operators and their second-seat drivers must be considered independent contractors who fall outside the coverage of the Act.

[182] Vasquez: 1300:20-24 (Started as a second-seat driver and bought his own truck after about two-and-a-half months "in order to make a little more money").

[183] Vasquez: 1308:2-8, 1346:10-25 (Bought a second truck when his first truck broke down and has run two trucks since 2018).

[184] Dominguez: 1496:3-15 (He stopped driving for one owner-operator because he did not want to work under the conditions set by that owner-operator).

[185] Banales: 1536:5-20 (He earned different rates depending on which owner-operator he drove for, and he could earn more if he delivered loads in a certain area).

[186] Naemo: 816:4 - 817:1 (There is an opportunity to negotiate the rates paid for any particular load); XPO Exh. 135; Pet. Exhs. 289, 290.

[187] XPO Exh. 138.

F. The Owner-Operators and Second-Seat Drivers Are All Skilled Workers

As discussed above, all of the Owner-Operators and second-seat drivers are specially licensed and experienced commercial drivers whom XPO does not train. It takes several months for them to obtain their licenses and to acquire the special skills needed to safely drive an 80,000 pound tractor and trailer combination.[188] Additionally, XPO will not allow anyone to haul loads under its authority without at least 12 months of experience.[189] In order to move certain specialized loads, such as hazardous materials, Owner-Operators and second-seat drivers must also acquire the particular endorsements to be able to do such work.[190] This factor clearly weighs in favor of independent contractor status.

G. Owner-Operators And XPO Believed They Were Creating An Independent-Contractor Relationship

The ICOC clearly identifies the relationship between Owner-Operators and XPO as an independent contractor relationship and any argument that the Owner-Operators did not understand the agreement should be rejected. Independent-contractor agreements constitute strong evidence that the parties believed they were creating an independent-contractor relationship. *See, e.g.*, *The Arizona Republic*, 349 N.L.R.B. at 1045; *St. Joseph News-Press*, 345 N.L.R.B. 474, 479 (2005); *Dial-A-Mattress*, 326 N.L.R.B. at 891; *Central Transport*, 299 N.L.R.B. 5, 13(1990); *see also Roldan v. Callahan & Blaine*, 219 Cal. App. 4th 87, 93 (2013), as modified (Sept. 18, 2013) ("courts must also presume parties understood the agreements they sign, and that the parties intended whatever the agreement objectively provides, whether or not

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[188] Freeman: 356:22 - 357:24 (It took Mr. Freeman about 300 hours over nine months to obtain his commercial driver's license); Naemo: 803:21 - 804:3 (It took three weeks of training, and three to six months of practice to acquire the skills needed to operate a truck); Moore: 833:15-21 (It took four to five months of school to get a commercial driver's license).
[189] Freeman: 208:17-18 (XPO requires 12 months of driving experience).
[190] Alvarez: 1161:3-18 (Obtained a Hazmat certificate and has received premiums of up to $500 for driving Hazmat loads).

they subjectively did"). Indeed, many Owner-Operators understand the clear implication of the agreement.[191]

It is indisputable that the ICOC labels the parties' relationship as independent contractor relationship rather than an employee relationship.[192] In *SuperShuttle*, the Board also found that the provisions in the franchise agreement left "little doubt as to the intention of the parties to create an independent-contractor relationship between *SuperShuttle* and its franchisees." *SuperShuttle*, 367 N.L.R.B. No. 75 at *14. Furthermore, two other factors supported this conclusion: the company did not provide franchisees with any benefits, sick leave, vacation time, or holiday pay and it did not withhold taxes or make any other payroll deductions from franchisees' pay. *Id.* Here, like in *SuperShuttle*, the Owner-Operators signed the ICOC and the attached Schedule N acknowledging their independent contractor status and the responsibilities and rights therein, and XPO does not withhold taxes from the Owner-Operators' pay or provide them with fringe benefits.[193] Other indicia of independent contractor status are also present. XPO provides Owner-Operators forms 1099 at the end of each tax year, and these same business owners take advantage of tax deductions further reflecting their independent contractor status.[194]

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[191] Aldrete: 1280:8-14 (When he left his former employer to work with XPO, he understood he would no longer be paid hourly nor would he have to work fixed shifts); West: 758:11-15 (Understood that when he started working with XPO, he would be working as an independent contractor); West: 799:8-11 (As an owner-operator, XPO is his customer); Naemo: 815:15 - 816:3 (Understands that his relationship with XPO is that of an independent contractor)

Moore: 832:3-12 (Understands that his relationship with XPO is that of an independent contractor); Zouri: 881:21 - 882:1 (Understands that his relationship with XPO is that of an independent contractor).

[192] XPO Exh. 13.
[193] Aldrete: 1277:8 - 1278:2
[194] *Compare* Alvarez: 1151:4-6 (As an owner-operator, he receives a 1099 from XPO); Vasquez: 1354:16-17 (Receives a 1099 from XPO annually), *with* Aldrete: 1279:2-12 (Received a W-2 from his former employer, but he has never received a W-2 from XPO).

To conclude that there was no understanding or belief that the parties were establishing an independent contractor relationship would amount to finding that the drivers are employees because they say they are employees. *Sisters Camelot*, 363 N.L.R.B. No. 13, slip op. at *4 (2015).

H. The Method of Payment Supports Independent Contractor Status

Owner-Operators are paid by the jobs they complete, and with the exception of occasional waiting time, not by the hours they work.[195] They are not provided with any benefits, nor does XPO withhold any taxes from their weekly settlement payments. But regularity in payments, even weekly, is an insufficient basis for this factor to weigh in favor of employee status. *See The Arizona Republic*, 349 N.L.R.B. at 1041, 1045 (weekly); *Dial-A-Mattress*, 326 N.L.R.B. at 887, 891-92 (bi-weekly); *see also* 49 C.F.R. § 376.12(f) (requiring pay in intervals not to exceed "15 days after submission" of paperwork).

At the end of the tax year, XPO issues Owner-Operators a form 1099.[196] It does not issue a similar document to the second-seat drivers because XPO does not pay them.[197] The second-

[195] Pet. Exhs. 224, 268.

[196] Limuaco: 636:3-6 (XPO sends 1099s to Owner-Operators on an annual basis); Vasquez: 1354:16-17 (Receives a 1099 from XPO annually); Alvarez: 1148:1-4 (His father is an Owner-Operator and receives a 1099 from XPO); Alvarez: 1151:4-6 (As an Owner-Operator, he receives a 1099 from XPO); Aldrete: 1279:2-12 (Received a W-2 from his former employer, but he has never received a W-2 from XPO); Avalos: 1017:18-23 (When he was an Owner-Operator, he received a 1099 from XPO); West: 765:4-11 (Receives a 1099 from XPO at years end); Moore: 842:24 - 843:1 (Receives a 1099 from XPO at year end); Zouri: 895:17-19 (Receives a 1099 from XPO at years end for each of his trucks.

[197] Freeman: 307:25 - 308:5, 366:12-15 (XPO does not send 1099s to second-seaters because it does not pay second-seaters); Samayoa Rosales: 1430:13-14, 1435:12-14 (Does not receive an annual tax form from XPO); Alvarez: 1147:15-25 (Received a 1099 from the Owner-Operator he drove for); Dominguez: 1491:22-24 (As a second-seat driver, he received a 1099 from the Owner-Operator he drives for); Banales: 1535:25- 1536:4 (Received a 1099 from each Owner-Operator he has driven for); Aldrete: 1274:6 - 1275:11 (XPO sends him a 1099 annually, and he sends his second-seat drivers forms 1099); Avalos: 1013:14-19, 1015:21-25, 1016:1-3 (As a

seat drivers' compensation arrangements are made directly between the Owner-Operators and the second-seat drivers.[198] Owner-Operators and their second-seat drivers (when authorized by their Owner-Operators) do, however, have the ability to negotiate over compensation for a particular load, which the ICOCs expressly contemplate.[199] Each of these facts weighs in favor of independent contractor status.

I. The Owner-Operators Function In The Corporate Form And Operate Like Independent Businesses

Owner-Operators operate as independent businesses. Numerous Owner-Operators have made the decision to operate their businesses as a corporation or a limited liability company.[200] They take tax deductions for their business expenses.[201] Some have home offices from which they conduct their business operations. Some choose to hire second seat drivers who drive the trucks they own for them or in addition to them.[202] Some hire outside accountants, and others use family members to do their financial books.[203] By all accounts, the Owner-Operators are small business people operating independently, and not as employees of XPO.

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second-seater, he receives a 1099 from the Owner-Operator, which he uses to prepare his taxes); Naemo: 811:11-14 (Receives a 1099 from the Owner-Operator he drives for at year end).

[198] Aldrete: 1274:6 - 1275:11 (XPO sends him a 1099 annually, and he sends his second seat drivers forms 1099).
[199] XPO Exhs 6, 7 (Schedule B at Section 2: "Changes In Fees.")
[200] XPO Exhs. 52-131 (Articles of Incorporation and Articles of Organization for Owner-Operators operating out of both the San Diego and Commerce terminals).
[201] Aldrete: 1277:8 - 1278:2 (As an owner-operator, he is responsible for the finances of his truck operation, including preparing his own taxes); Ramirez: 1414:12-20 (As an owner-operator, he is responsible for keeping track of his truck-related expenses).
[202] Vasquez: 1308:11-13, 18-23 (Currently has two second-seat drivers, including his friend Mario Cevallos, who Mr. Vasquez recruited to drive his truck); Aldrete: 1578:6-13 (Has had approximately eleven second seat drivers during his time working with XPO).
[203] Zouri: 896:3-15 (Deducts business expenses, has someone do his taxes, and has a home office)

J. The Instrumentalities, Tools and Places of Work Weigh In Favor of Independent-Contractor Status

As discussed above, XPO does not own the tractors operated by the Owner-Operators and second-seat drivers. Nor does XPO own the containers or chassis that it hires them to move. Indeed, the Owner-Operators and second-seat drivers must pay for virtually all of the costs associated with operating their trucks.[204] They pay for maintenance, insurance, licensing, and all other aspects of operating their businesses.[205] They also decide how much maintenance to conduct and where to obtain their insurance.[206] The Board itself has recognized in other contexts that the decision to conduct or defer maintenance is entrepreneurial. *See, e.g. UOP, Inc.*, 272 N.L.R.B. 999, 1000 (1984)(closure of plant due to obsolete equipment). This common law factor clearly weighs in favor of independent contractor status. Restatement (Second) of Agency §220 (1958), factor (e).

K. The Length-of-Time Factor Favors Independent-Contractor Status

While Specific Owner-Operators are able to and do contract with XPO for many years, the contract itself has a duration of 90 days, and must be renewed every 90 days.[207] Moreover, Owner Operators can terminate their contracts with XPO on 30 days' notice without justification.[208] An Owner-Operator's voluntary decision to continue contracting with XPO

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[204] Avalos: 1019:20-23 (The owner-operator is responsible for truck-related expenses); Vasquez: 1355:2-7 (As an owner-operator, he is responsible for the expenses related to operating his truck); Banales: 1534:25 - 1535:2 (Owner-operators must pay for the maintenance on their trucks).
[205] *Id.*
[206] Freeman: 411:17-21 (Owner-Operators can purchase their own insurance or get insurance at a discount through XPO); Avalos: 1043:13-17 (The Owner-Operator is responsible for truck maintenance and determines whether the truck can be operated by the second-seat driver); Aldrete: 1275:24 - 1277:4 (As an Owner-Operator, he is responsible for the maintenance of his truck); Alvarez: 1123:9-14 (Drivers can choose which carrier to purchase insurance from).
[207] XPO Exh. 13, Section 3.
[208] *Id.*

because it is financially favorable is not an indication of employee status. In this environment, and in the complete absence of contrary evidence, all that the length of time demonstrates is the pursuit of economic opportunity, i.e., that the Owner-Operators who continue to work for XPO find it in their best interest to do so and those that do not move on. Where the length of time does not indicate that a contractor is beholden to the company, the length of time adds little to the analysis. *Cf. Lancaster Symphony Orchestra,* 357 N.L.R.B. 1761, 1766 (2011) (orchestra members returning for successive one-year periods for up to 30 and 59 years not conclusive of employee status).

L. The Second-Seat Drivers Are Not XPO's Employees And Should Be Excluded From The Unit

While XPO has contractual agreements with Owner-Operators, their second-seat drivers do not execute full ICOCs with XPO.[209] Instead, these drivers sign Schedule K to the ICOC with XPO, confirming their contractor status.[210] XPO does not dictate their hours or pay nor do these drivers receive compensation from XPO.[211] Only Owner-Operators receive a 1099 tax form from XPO, including for work performed by their second-seat drivers.

Second-seat drivers have a contractual or employment relationship with their Owner-Operators, and some Owner-Operators even enter into independent-contractor agreements with

[209] Limuaco: 620:11-20 (Unlike Owner-Operators, second-seaters do not execute the entire independent contractor operating agreement).
[210] XPO Exh. 13, Schedule K; Limuaco: 620:11-20 (Unlike owner-operators, second seaters do not execute the entire independent contractor operating agreement).

[211] Freeman: 307:25 - 308:5, 366:12-15 (XPO does not send 1099s to second-seaters because it does not pay second-seaters); Ramirez: 1368:11-17 (XPO has no control over the remuneration paid to second-seat drivers by the Owner-Operators); Samayoa Rosales: 1430:13-14, 1435:12-14 (Does not receive an annual tax form from XPO because he is a second-seat driver); Dominguez: 1509:5-9 (XPO does not dictate how much Owner-Operators pay their second-seaters).

their drivers.[212] The Owner-Operators, not XPO, determine the compensation for these drivers and provide them with annual tax forms.[213] Second-seat drivers also exercise the ability to negotiate higher rates from Owner-Operators. For these additional reasons, they should be excluded from the unit.

V. INAPPROPRIATENESS OF THE PETITIONED-FOR BARGAINING UNIT

Whenever unit appropriateness is questioned, the Board has traditionally determined "whether the employees in a petitioned-for group share a community of interest sufficiently distinct from the interests of employees excluded from the petitioned-for group to warrant a finding that the proposed group constitutes a separate appropriate unit." *See PCC Structurals, Inc.*, 365 NLRB No. 160, slip op. at 6 (2017); *See also Boeing Co.*, 368 NLRB No. 67, slip op. at 3 (2019) (holding that "the proposed unit must share an internal community of interest"). The Board applies a multi-factor test that considers:

> Whether the employees are organized in separate departments; have distinct skills and training; have distinct job functions and perform distinct work; including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

PCC Structurals, at *13 (internal citation omitted). The Board has "always assumed it obvious that the manner in which a particular employer has organized its operations and utilizes the skills of the labor force has a direct bearing on the community of interest among the various groups of

[212] Dominguez: 1496:3-15 (He stopped driving for one Owner-Operator because he did not want to work under the conditions set by that Owner-Operator); Banales: 1539:9-11 (He stopped driving for one Owner-Operator because that Owner-Operator hired a different second-seat driver to drive his truck).

[213] Zouri: 894:16-19 (What an Owner-Operator pays a second seat driver is between the Owner-Operator and the second-seat driver; XPO is not involved); Aldrete: 1271:6 - 1272:8 (Owner-Operators with second-seat drivers are responsible for paying the second-seat drivers. XPO does not determine how much an Owner-Operator pays his or her second-seat driver(s)).

employees… and is, thus, an important consideration in any unit determinations." *International Paper Co.*, 96 NLRB 295, 298 n.7 (1951).

When evaluating bargaining unit appropriateness, the Board has also applied a longstanding presumption favoring single-location bargaining units. The principles underlying the single-unit presumption are also instructive here. *See Dixie Belle Mills, Inc.*, 139 NLRB 629, 631 (1962)(a single-facility unit is "presumptively appropriate" unless two locations have been "so effectively merged into a more comprehensive unit by bargaining history" or "so integrated with another as to negate its identity. . . ."); s*ee also Sutter West Bay Hosps.*, 357 NLRB 197, 200 (2011) (The party contesting a single-facility unit bears a "heavy burden of overcoming the presumption.").

A. The Owner-Operators and Second-Seat Drivers At XPO's Commerce and San Diego Facilities Do Not Share A Community Of Interest

The petitioned-for unit is also inappropriate because the Petitioner cannot demonstrate that the Owner-Operators and their second-seat drivers at XPO's separate Commerce and San Diego facilities share a community of interest. As discussed above, the Owner-Operators and their second seat drivers operate out of two separately managed and operated facilities. *See Boeing*, at 1 (finding that employees belonging to separate departments did not share a community of interest).

There is also no meaningful interchange between the two XPO facilities; if one facility is short on drivers, it generally does not look to the other facility to overcome that shortage.[214] *See id.* Moreover, because they receive dispatches almost exclusively out of one facility or the

[214] Freeman: 242:17 - 243:19 (It is only in rare situations that a load may transfer from the San Diego terminal to the Commerce terminal, or vice versa; this happens with less than one percent of loads); Freeman: 533:24 - 534:9 (In order to transfer from one facility to another, an XPO employee must submit a form and request the transfer from their manager).

other,[215] the Owner-Operators and second-seat drivers at the two separate facilities have little to no contact with one another, much less "frequent daily contact."[216] *See id.* at 4. While some San Diego Owner-Operators and second-seat drivers occasionally utilize the Commerce facility to have overweight loads repositioned, there is no evidence that they interact with the Owner-Operators and second-seat drivers who receive dispatches out of Commerce.

The Owner-Operators and second seat drivers at each facility also serve different customer bases. Those working with the San Diego facility typically run loads to the Mexican border almost exclusively serving a single automotive client south of the border.[217] By contrast, Owner-Operators and second seat drivers having their loads dispatched out of Commerce serve the entire geographic region of the Los Angeles basin and its highly varied customer base.[218] This reality also impacts the terms and conditions of work, which are different at the two facilities. Each sets separate rate schedules and premium payments for Owner-Operators and their second-seat drivers.[219] Similarly, the typical length of route offered out of San Diego is

[215] Samayoa Rosales: 1430:19 - 1433:10 (As a Commerce driver, he occasionally delivered some loads that originated from San Diego dispatch); Pet. Exhs. 287, 288 (San Diego dispatch sent 28 loads, or 0.13% of its total loads over the past six months to Commerce. Commerce sent no loads over the past six months to San Diego).

[216] Yabio: 1451:1-3 (Although he does some local loads in Los Angeles, he receives dispatches from San Diego); Samayoa Rosales: 1433:4-10 (The Commerce and San Diego terminals have separate dispatch systems); Banales: 1531:9-15 (Only receives dispatches from the San Diego terminal).

[217] Limuaco: 568:18 - 569:1, 574:17 - 575:6 (The San Diego terminal has a smaller staff of planners and dispatchers than the Commerce terminal because it serves a particular customer base).

[218] Freeman: 219:17 - 220:12 (The Commerce terminal has a much larger support staff because it services over 800 unique destinations, while the San Diego terminal's smaller support staff focuses on servicing two main customers); Darling: 91:19 - 92:9 (The San Diego and Commerce terminals serve different customer bases).

[219] Alvarez: 1151:16-25, 1168:14-16 (He signed the Commerce terminal Schedule B because that is where he chose to receive dispatches from; he never signed the San Diego Schedule B); Freeman: 309:9 - 310:4 (The San Diego terminal pays drivers for on-time deliveries, while the Commerce terminal does not); Freeman: 545:3-9 (Changes to Schedule B are initiated at the

longer than out of Commerce,[220] schedule predictability of the loads offered is more consistent out of San Diego, which offers a pre-dispatch program, and separate operating hours differentiates the nature of the work out of the San Diego facility from that offered out of the Commerce facility.[221] Moreover, San Diego-based Owner-Operators and second-seat drivers must frequently cross weight scales, which brings additional responsibilities.[222]

Accordingly, similar to the petitioned-for unit in *Boeing* that involved two job classifications at a single plant, the petitioned-for unit here is inappropriate because it involves two distinct groups of Owner-Operators and second-seat drivers performing work under different conditions at two functionally and geographically separate locations. *See id.* at 7. The record evidence demonstrates there is no support for a finding that Owner-Operators in Commerce and San Diego share an "internal" community of interests, *Boeing*, slip op. at 3, and the record is clearly inadequate to treat the Commerce and San Diego facilities as a single combined

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terminal level based on market forces and input from the drivers); Limuaco: 611:18-20 (The San Diego terminal maintains a separate Schedule B, which is different than the Schedule B at any other XPO terminal); Limuaco: 658:13-25 (The San Diego terminal will pay a driver that is stuck on the roadside a flat fee, while the Commerce terminal will pay based on the length of time the driver is unable to move his or her truck); Darling: 130:24 - 131:13 (The Schedule B rates for the San Diego and Commerce terminals are set by each terminal's respective manager).

[220] Limuaco: 594:17 - 595:24 (The length of runs dispatched from the Commerce terminal are, on average, shorter than the length of runs dispatched from the San Diego terminal).

[221] Limuaco: 578:6-25 (The San Diego terminal has a particularly small number of hard appointments because of the type of work performed at the San Diego terminal); Limuaco: 579:16-24, 582:8-19 (The San Diego terminal has many more open appointments compared to the Commerce terminal); Limuaco: 583:3-20 (The predictability of work at the San Diego terminal and limited delivery destinations differentiates it from other XPO terminals); Limuaco: 590:11 - 591:6 (The San Diego terminal maintains certain operating hours based on when the U.S.-Mexico border is open and the particular needs of the terminal's customers); Limuaco: 661:2-13 (Drivers operating out of the San Diego terminal are required to wait at rail yards or customer facilities less frequently than drivers operating out of the Commerce terminal).

[222] Limuaco: 720: 19-23 (Drivers operating out of the Commerce terminal are required to cross scales less frequently than drivers operating out of the San Diego terminal).

bargaining unit, as opposed to two separate single-location units. *See Sutter West Bay Hosps.*, 357 NLRB at 200.

VI. CONCLUSION

For the foregoing reasons, the Owner-Operators and their second-seat drivers are not properly classified as employees of XPO and are thus not within the Board's jurisdiction under the Act. Should the Regional Director, nevertheless, issue an election order for any members of the proposed unit, the bargaining units must be defined separately at (1) XPO's Commerce facility, and (2) XPO's San Diego facility, with each unit subject to a separate vote.

DATED: March 14, 2022

Respectfully submitted,

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I, Holger G. Besch, an attorney, do hereby certify that I have caused a true and correct copy of the foregoing XPO LOGISTICS CARTAGE, LLC'S POST-HEARING BRIEF via electronic filing, and on all parties of record via email on this 14th day of March, 2022:

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 848 and LOCAL 542, Petitioners, and **XPO LOGISTICS CARTAGE, LLC,** Employer	CASE NO. 21-RC-289115

PETITIONERS' POST-HEARING BRIEF REGARDING PRE-ELECTION HEARING

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Bashas', Inc.,
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Battle Creek Health System,
341 NLRB 882 (2004) 46

Big East Conference,
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333 NLRB 143 (2001) 41

Capital Coors,
309 NLRB 322 (1992) 31

Cardiovascular Consultants,
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Clarian Health Partners,
344 NLRB 332 (2005) 31

Corporate Express Delivery Systems,
332 NLRB 1522 (2000) 43

Dial-A-Mattress Operating Corp.,
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FedEx Home Delivery,
361 NLRB 610 (2014) 2, 42, 78, 95

Holly Farms Corp. v. NLRB,
517 U.S. 392 (1996) 42

Intermodal Bridge Transport,
369 NLRB No. 37 (2020) ..... *passim*

Lancaster Symphony Orchestra,
357 NLRB 1761 (2011) 57

Metropolitan Taxicab Board of Trade,
342 NLRB 1300 (2004) 57, 94

National Freight, Inc.,
153 NLRB 1536 (1965) 95

NLRB v. Carson Cable TV,
795 F.2d 879 (9th Cir. 1986) 31

NLRB v. United Ins. Co.,
390 U.S. 254 (1968) 41, 42, 43, 44, 74, 88

Nolan Enterprises, Inc.,
370 NLRB No. 2 (July 31, 2020) ..... *passim*

North American Van Lines v. NLRB,
869 F.2d 596 (D.C. Cir. 1989) 44

Nu-Car Carriers, Inc.,
88 NLRB 75 (1950) 74

OS Transp. LLC,
358 NLRB 1048 (2012) 78

Pathmark Stores, Inc.,
342 NLRB 378 (2004) 41

Progressive Transp. Services,
340 NLRB 1044 (2003) 46

R & D Trucking,
327 NLRB 531 (1999) 32, 39, 40

Roadway Package Sys.,
288 NLRB 196 (1988) 44

Roadway Package Sys., Inc.,
326 NLRB 842 (1998) 42, 43, 45

Sisters Camelot,
363 NLRB 162 (2015) ..... *passim*

Slay Transp. Co.,
331 NLRB 1292 (2000) 43

Specialty Healthcare & Rehabilitation Ctr.,
357 NLRB 934 (2011) 31

Stamford Taxi,
332 NLRB 1372 (2000) 49

Standard Oil,
230 NLRB at 972 (1977) 7

SuperShuttle DFW, Inc.,
367 NLRB No. 75 (Jan. 25, 2019) ..... *passim*

Trane,
339 NLRB 866 (2003) 31, 39, 40

Velox Express, Inc.,
368 NLRB No. 61 (Aug. 29, 2019) 73, 85, 88

Waste Mgmt. Nw.,
331 NLRB 309 (2000) 39, 40

Other Authorities

49 CFR Part 371 50

Brett Murphy, *Rigged*, USA TODAY (Jun. 16, 2017) 1

Los Angeles Times, "Port Truckers Win $30 million in wage theft settlement"
(Oct. 13, 2021), ... 4

Restatement (Second) of Agency, Section 220 (1958) 41

Veena B. Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CAL. L. REV. 101 (2017) 1

I. Introduction

XPO is a case study in the nefarious effects that misclassification can have on workers' ability to exercise their rights under the Act, and of the incredible lengths an employer will go to in order to benefit from such misclassification while at the same time ensuring that it has the long-term, consistent workforce that it needs to accomplish work at the core of its business in the manner that it and its customers require. Despite XPO's grandiose claims that its drivers are completely independent businesses who regularly exercise entrepreneurial opportunity by making important business decisions, the actual facts of the working relationship demonstrate that like countless other drivers in the port and intermodal trucking industries, or other workers in the on-demand economy, XPO's drivers are actually employees who do work at the core of XPO's business in the manner that XPO requires it be done, and their misclassification leads them to be treated as nothing more than "modern-day indentured servant[s]"[1] or modern-day "wage slaves."[2]

At XPO's Commerce facility, drivers began organizing and challenging their misclassification in approximately 2014. *XPO Cartage, Inc.*, JD-57-18, Case No. 21-CA-150873, at 12 (Sept. 12, 2018) (hereinafter "ALJD I"). XPO immediately responded to employees' organizing efforts by emphasizing that drivers were not employees under the Act and by otherwise violating the Act, leading the Teamsters to first file unfair labor practice charges against XPO in April 2015. *Id.* Because of the complexity of the employee status analysis and because of delay inherent in the Board's process, it took over three years before these charges

[1] Brett Murphy, *Rigged*, USA TODAY (Jun. 16, 2017), https://www.usatoday.com/pages/interactives/news/rigged-forced-into-debt-worked-past-exhaustion-left-with-nothing/

[2] Veena B. Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities,* 105 CAL. L. REV. 101 (2017).

were finally heard and a decision was issued. In September 2018, Administrative Law Judge Christine E. Dibble decisively found that XPO's drivers were employees under the Board's common law test, as articulated in *FedEx Home Delivery*, 361 NLRB 610 (2014). *Id.* In so deciding, Judge Dibble relied on the following facts:

> [XPO] solicits the clients and controls virtually all aspects of the Company's interaction with them; [XPO] determines the rate schedule and fees for the drivers; [XPO] controls the distribution of assignments to drivers; the drivers are not engaged in a distinct occupation of business, but rather work as part of [XPO's] regular business; the drivers are, in practice, retained for an indefinite period; [XPO] is in the same business as the drivers; and the drivers do not have a significant entrepreneurial opportunity for gain or loss.

ALJD I at 24.

Unfortunately, rather than the Board immediately affirming Judge Dibble's unimpeachable reasoning, the Board remanded the case back to Judge Dibble because the Board had contemporaneously issued a decision in *SuperShuttle DFW, Inc*., 367 NLRB No. 75 (Jan. 25, 2019), which addressed how the employee status test must be applied. As part of its delay tactics, XPO pushed for a reopening of the record and a new hearing, which meant XPO was given another chance to present evidence supporting its contention that its drivers were independent contractors. Predictably, XPO was once again unable to carry the burden of showing that drivers were independent contractors. Thus, in April 2021, six years after drivers initially began to challenge their misclassification and filed charges against XPO, Judge Dibble issued a supplemental decision finding that under the Board's *SuperShuttle* formulation focusing on entrepreneurial opportunity, there was even stronger evidence supporting the fact that XPO's drivers are "employees protected by the Act." *XPO Cartage, Inc*., JD-22-221, Case No. 21-CA-150873, at 21 (Apr. 30, 2021) (hereinafter "ALJD II").

Judge Dibble, moreover, was not the only government agent or decision maker who had occasion to examine the working relationship between XPO and its drivers. Many drivers from

the Commerce facility brought individual claims before the California Department of Labor Standards Enforcement,[3] which in 2017 found that drivers

> were [XPO's] employees. [XPO] retained pervasive control over the operations as a while, and [drivers'] services were an integral part of [XPO's] business. Substantial evidence supports the finding that [drivers] were functioning as employees rather than as true independent contractors."

PX 223 at 19.[4] After multiple cases were appealed to the California Superior Court and consolidated for a de novo appeal, the Court found that ten drivers "were misclassified as independent contractors," also analyzing the same facts that are relevant under the Board's analysis. PX 222 at 57.

Further, at the start of the pandemic, many drivers at XPO's San Diego facility—both truck owners and so-called second-seat drivers who drove trucks owned by other drivers—were forced to apply for unemployment benefits after a stark reduction of work. Because of XPO's misclassification and its scheme of requiring truck owners to pay second-seat drivers instead of XPO paying them directly, the EDD initially denied some claims, found some drivers to be self-employed, and found other drivers to be employed by the truck owners instead of by XPO. Many of these drivers appealed these initial Employment Development Department ("EDD") decisions and obtained hearings before Administrative Law Judges. In every single one of the approximately eight cases that went to administrative law judges, the Judge found both the driver truck owners and the second-seat drivers to be employees of XPO. Two of these decisions were then appealed to and affirmed by the California Unemployment Insurance Appeals Board. The

[3] Although such determinations by state agencies are not determinative for Board purposes, the Board has recognized that determination from state agencies should be considered and given "probative weight" in the analysis. *Dynatron/Bondo Corp.*, 324 NLRB 572, 587 fn. 54 (1997); *see also Cardiovascular Consultants*, 323 NLRB 67 (1997).

[4] The transcript is cited as "Tr." followed by a span of page and line numbers. Employer Exhibits are cited as "EX" and Petitioner Exhibits are cited as "PX" with a page number or other information identifying a specific location in the document where necessary.

others stood without appeal. Taken together, all of these decisions make clear not only that both truck owners and second-seat drivers are employed by XPO, but also that there is no employment relationship between truck-owners and the second-seat drivers who utilize those trucks to do work for XPO. PX 228, 251, 252, 253, 254, and 255.

Likely buoyed by the supplemental decision from Judge Dibble, these additional victories affirming drivers' status as employees, and a 20-million dollar settlement in 2021 in a class action case where the San Diego and Commerce facilities were certified as a class,[5] a majority of drivers at both these two facilities—including truck owners and second-seaters—demanded recognition from XPO on January 12, 2022. After XPO refused to recognize the Union, they filed the instant petition on January 19, 2022. After another twelve days of hearing—further delaying drivers' ability to exercise their rights under the Act—the only thing that XPO has succeeded in is to highlight that: (1) nothing substantive has changed since Judge Dibble's decisions or since the other decisions finding XPO's drivers to be employees; and (2) drivers at the Commerce and San Diego facilities do the exact same work under the same centralized control and under substantially similar working conditions.

Although XPO will try to artificially focus the analysis only on what is happening "now" and will attempt to minimize any employee status indicia from even months ago, there is nothing in Board law that justifies this approach. As has been consistently reiterated by the Board and the courts, even in *SuperShuttle*, the employee status analysis looks at the *totality* of the working relationship between an employer and its putative employees. This means that past policies,

[5] PX 225(Fourth Amended Complaint in Alvarez, et al. v. XPO Cartage, LLC, et al. Case No. 2:18-cv-03736-RGK-E), PX 227 (Order on Motion for Class Certification in Alvarez, et al. v. XPO Cartage, LLC, et al., Case No. 2:18-cv-03736-RGK-E); *Los Angeles Times*, "Port Truckers Win $30 million in wage theft settlement" (Oct. 13, 2021), https://www.latimes.com/business/story/2021-10-13/la-fi-port-trucker-xpo-settlements

rules, and regulations have a lasting effect on a group of workers, particularly when many of the same drivers have been doing the same work for XPO since those policies were explicitly in effect. In this case, over half of XPO's current drivers have been working since at least 2018 and a quarter of current drivers have been working since at least 2016—which clearly negates XPO's argument that the Region must have an artificially narrow focus and can *only* look at things that are happening "now." EX 14–15. Moreover, the Region should afford even more weight to policies, even ones established long ago, where, as here, there is no evidence that the policies have been explicitly rescinded.

Thus, seeing as we now have two decisions applying both of the employee status tests the Board has utilized in the recent past—decisions which were reached after countless hours of investigation by the Region and weeks of hearing before Judge Dibble—the burden must be on XPO to decisively show that it has made sufficient significant changes to its operations to merit a different result. XPO cannot be allowed to merely make the same argument based on the same types of evidence until it achieves the result it wants. XPO has failed to meet that burden and when the totality of circumstances is properly analyzed, it becomes clear that drivers, many of whom have been working for XPO since before the first of Judge Dibble's decisions, continue to do the exact same work at the core of XPO's business under functionally the same conditions and restraints. The only obvious difference is that, as a result of the pandemic, XPO is now using a new electronic application to communicate with drivers and it has dissuaded drivers from congregating in person to the extent that they used to before the pandemic. But these changes do not speak to the heart of the employee status analysis, and the lack of any changes that speak to the heart of the employee status analysis is logical because no matter how much XPO wants to escape the responsibilities that come with having employee drivers, its business could not

survive without the steady and consistent workforce it has come to rely on at the San Diego and Commerce facilities. Merely turning to an electronic application—no doubt seeking to equate itself with the on-demand gig economy—or making superficial changes to the fringes of the working relationship with its drivers does not change this reality.

Although XPO has taken illusory steps to divorce itself from its drivers, this lip service is insufficient to mask the clear employment relationship between XPO and the drivers who do work at the core of its business. For these reasons and as further described below, the Region must order an election in the petitioned for unit.

II. Summary of Facts

A. XPO's Operations

XPO is engaged in the business of transportation logistics services. As a practical matter, this means XPO is primarily a trucking company, using drivers to move goods from one location to another, at the direction of customers who set the time and place of pick up and drop off. In particular, this case concerns two southern California terminals—facilities owned by the Employer that serve as dispatch hubs for commercial truck drivers who carry short-haul loads of containerized goods primarily between locations set by XPO's customers and ports, rail yards, and other national and international cargo transit hubs. Despite XPO's protestations that transportation logistics is distinguishable from the actual movement of goods by its drivers, "there [i]s no substantive distinction between [XPO']s core businesses and the function of the drivers." ALJD II at 21:10–11 (Apr. 30, 2021); Tr. 17:1-2.

The two facilities in question, located in Commerce and San Diego, California, specialize in a specific kind of transportation logistics, called "intermodal," which is defined by the coordinated "transportation of goods using two or more . . . different modes of transportation" such as ships, tractor trailers, and rail. XPO uses the drivers in the petitioned-for unit to provide,

among other services, "bookends [of] short-haul drayage on both ends" of long-haul rail journeys, often from one end of the country to another. Tr. 43:19–25, 44:1–5, 45:6–47:3; *see also* EX 3.

In order to adequately serve its intermodal customers, XPO must actively coordinate the movement of containers among various "vendors" such as ports, railroads, and warehouse facilities operated by its customers, often within a relatively tight timeframe. XPO's customers contract with XPO in part because of its ability to "commit to large amounts of volume in multiple different lanes throughout the country." XPO's success depends on its ability to marshal its "expertise and technology" to ensure its customers' cargo is at the right place by the right time. XPO's business model is dependent on real time, accurate coordination, because intermodal transport is built on yearly "bidd[ing] cycles" in which carriers like XPO compete for the business of customers who typically sign contracts based in part on shippers' records of successful deliveries. Such coordination inherently requires XPO to directly manage most, if not all, of the logistical complexities that arise during this process. Tr. 45:6–48:13, 49:19–22, 50:19–51:8, 59:12–60:13.

B. XPO's Centralized Control of Driver Conditions

Centralized control is critical to XPO's success in the intermodal transport market. Regional Vice Presidents overseen by the Vice President of Operations have operational oversight over terminal activity and execution, driver recruiting, and organizational safety for all the terminals within their region. Since XPO's corporate office in Dublin, Ohio created a new West Coast region made up of six XPO terminals in 2018, Regional Vice President Mark Darling has exercised that operational oversight over both the Commerce and San Diego terminals. Centralized decision-making at the Vice President level determines policies that affect both terminals. XPO decides at the corporate level who the management team for each facility will be.

XPO's corporate office prepares profit and loss statements that cover both the Commerce and San Diego facility in a single document. Decisions about the terminals are often made at the corporate level. Driver-specific inquiries are also resolved at the corporate level, such as issues with a driver's pay. Tr. 36:18–37:18, 69:16–24, 87:1–13, 370:21–22, 373:22–24, 377:13–23, 391:7–18; EX 2, EX 4.

1. Driver Recruitment

Much of XPO's recruitment operation is likewise centralized. Corporate-level XPO employees, like the Director of Recruiting, set policy. XPO corporate sets the qualifications for driver applicants and designs the application that all drivers, whether owner-operators or second-seat, must complete. Questions that arise during that application process are directed to corporate representatives. XPO's recruiting teams in Ohio draft and post advertisement copy tailored to the needs of each terminal. Even those aspects of recruitment policies not set directly by corporate require approval from executives with authority over both terminals. For example, referral bonus and sign-on bonus amounts need approval from the Regional Vice President. Tr. 68:21–69:5, 378:5–7, 379:1–14, 614:21–23, 727:17–23, 1179:9–15, 1297:21–25; PX 84, PX 236, PX 272.

2. Contractual Relationships with Drivers

The bulk of the contractual relationship between XPO and its drivers is dictated by XPO's legal department in Ohio. With the exception of Schedule B, the entire text of the independent contractor operating contract ("ICOC"), which owners sign, is identical across both terminals. The ICOC is a non-negotiable contract of adhesion: If drivers do not sign the contract as provided, XPO will not give them work. The contract is provided to drivers only in English, even if drivers are monolingual Spanish speakers. If a driver transfers from one terminal to another, XPO will use the same ICOC that the driver has already signed and only require the driver to sign a new Schedule B. Second-seat drivers—who do not own or lease their own trucks

but instead drive a truck owned or leased by a driver who has signed the full ICOC with XPO—do not sign the full ICOC but are required to sign Schedule K of the ICOC. Tr. 282:10–13, 283:7–19, 379:15–380:1, 547:4–16, 621:4–11, 953:21–954:5, 1200:6–22, 1301:8–25, 1446:9–11; EX 13.

3. Driver Compensation

Although nominally set terminal by terminal, XPO driver compensation, which is laid out in the aforementioned Schedule B, is largely subject to centralized coordination. While each terminal has its own Schedule B, they are issued by XPO's corporate office each quarter, and corporate has the sole discretion to approve or deny revisions proposed by terminal directors. This centralized control is further evident from the identical mileage bands in the Commerce and San Diego Schedule B's, showing that trips of similar length are compensated at the exact same rate at both terminals. Many of the types of additional compensation, like endorsement premiums, are also consistent across facilities. With respect to "unplanned" premiums (*i.e.* premium pay offered to drivers on top of what the Schedule B provides), XPO's corporate office, through a procurement department that is responsible for collecting data regarding the market, collects and analyzes data on unplanned premiums paid on a quarterly basis and uses it to revise future line-haul rates. Owner-operators are also issued IRS 1099 forms directly from XPO's corporate office. Tr. 134:18–135:9, 295:16–296:10, 636:3–6, 650:21-651:6; *compare* EX 6 at 3–9 *to* EX 7 at 3–9.

4. Safety Policies

Both terminals are subject to safety policies set centrally. XPO's safety department in Ohio sets safety protocols that drivers in San Diego and Commerce must follow or risk termination. XPO's Director of Safety has authority over both Southern California facilities. XPO maintains a centralized repository of safety documents through a third party called

Tenstreet. These documents include a driver's motor vehicle record, a CDL copy, employment verification, correspondence, verification of previous work experience for owner-operators, and records associated with contracting that owner-operator. Terminal level management cannot change XPO policy regarding safety related rules, including the 75-point threshold for discharge of drivers described below. XPO also has a corporate-level relationship with J.J. Keller for the provision to drivers of electronic logging devices and software for tracking of hours and a variety of other safety-related matters. Tr. 68:5–19, 304:24–305:1, 394:1–404:2, 466:16–468:7, 480:18–25; PX 6 at 114:5–25.

Terminal managers are required to communicate with XPO's corporate offices regarding preventable accident policies. Region-wide safety meetings have been held every Wednesday for several years. Although these meetings are voluntary, XPO tracks driver attendance by noting which drivers call in to participate. Both terminal directors receive emails from XPO's Regional Safety manager regarding safety meetings. In addition, messages about safety meetings are sent to all drivers at both facilities via the Zipwhip text application. Tr. 439:14–18, 440:3–7, 448:17–449:10, 450:18–22; PX 22, 38.

5. Dispatch and Coordination

XPO's corporate office exercises a similar level of control over the dispatching of drivers at both facilities. Although each terminal has a separate dispatch team, both San Diego and Commerce use the same two proprietary software applications to conduct dispatches—Intermodal Fleet and Rail Optimizer. Rail Optimizer allows users to see info about another terminal's loads. Because the software is shared across terminals, it allows XPO support staff at either terminal (or at the corporate office) to communicate with drivers, assign loads, and track shipments nationwide. Additionally, all drivers use the Intermodal Fleet application on their tablets or other devices to communicate with dispatch, with the same format and layout of

information to view their work. Tr. 39:11–40:13, 114:3–115:9, 376:15–377:10; PX 3, PX 6 at 47:24–48:1 (Freeman noting no local input into usage of these electronic systems), EX 5, EX 8.

This instantaneous access to nationwide driver and load information allows XPO's corporate office to coordinate essentially all interaction between drivers and XPO's customers. XPO clients contact XPO's office in Dublin, Ohio—not specific terminals—to plan shipments. A single intermodal load requires active coordination from Ohio. XPO's customers contact the corporate office to coordinate transportation of loads based on the pick-up and drop-off location, XPO then determines the terminal that drivers are dispatched from. Centralized control of pick-ups and drop-offs is necessary to ensure proper timing. Planners at each terminal then coordinate with Ohio to meet customer demands. Tr. 44:6–48:13, 59:2–60:19, 218:1–20.

6. Centralized Control and XPO's Business Model

Centralized control is thus essential to the success of XPO's entire intermodal operation. XPO chooses to operate as a federally registered motor carrier, using XPO's own operating authority, even though the work could all be sent to outside carriers who use their own authority. But for XPO, "there is no practical reason [to send all the work to outside carriers, a/k/a "core carriers," because XPO] would lose all of the owner-operators that are currently contracted . . . ." The line haul rates paid to outside carriers are generally higher than those paid to owner-operators "because the core carriers are carriers paying for all of their expenses, all of their permits, and taxes, and fuel, and typically higher insurance." Tr. 414:13–415:3, 416:1–4; PX 6 at 33:8–12 (referring to outside carriers as "independent individual companies," in contrast with the XPO drivers).

C. Terms and Conditions of Driver Employment

1. Conditions Have Essentially Remained Consistent over Time

The working conditions for drivers at the Commerce and San Diego terminals have been largely unchanged for at least the last decade. *See, e.g.*, Tr. 932:11–19,[6] 935:5–18; 1459:6–18. In fact, drivers who have worked primarily out of the Commerce terminal since before XPO acquired that facility in or about 2015 testified that most of their day-to-day working conditions remain undisturbed from the time that facility was owned by XPO's predecessor, Pacer Cartage. To the extent conditions have changed during that period, these changes allow XPO to exercise *more* control over the drivers. Specifically, the increasing use of software applications (especially Intermodal Fleet) to communicate with drivers, track shipments, and coordinate with customers means that XPO has access to drivers throughout their work, and managers at both the terminals and at XPO's corporate office in Dublin can track shipment information in real time. Tr. 40:1–22 (software developments since 2018); Tr. 44:6–48:13 (tracking and coordination).

Domingo Avalos testified that

> from the beginning that I just started to work on 2012, I am doing exactly the same. I receive from the dispatcher that gave us from the office of Commerce, he give me the instructions about the number of the --of the box that I have to get and from what-- position it is located and also the name of the person that I have to bring it to. . . . I have to fill up all the paperwork that the dispatcher give me, like the logbook, the manifest, and the memo delivery. I do exactly the same.

Tr. 935:5–18; *see also* Tr. 1459:9–18.

2. Hiring and Onboarding

(a) All Drivers Must Apply to Work for XPO

XPO requires that all drivers submit an application to work for XPO. Both truck owners and second-seat drivers must complete the same application. XPO's application process is

[6] *See also* Tr. 934:16–18 (overruling objection).

extensive, requiring that drivers provide background information and references from previous employers, among other things. XPO also conducts a background check. Tr. 207:3–7, 1097:13–19, 1106:8–19, 1163:6–21, 1178:6–1179:15, 1203:1–11, 1296:20–1297:25, 1358:17–1359:17, 1461:25–1462:2, 1517:7–18; PX 236, PX 262, PX 263.

(b) Driver Qualifications

To work for XPO, drivers must meet XPO's requirements that are more stringent than federal or state requirements—a driver may be qualified as a commercial truck driver and yet not meet XPO's requirements. Unlike the federal requirements, XPO requires that drivers have at least 12 months of experience driving a commercial vehicle. Drivers are required to pass a driving test even though they have already been qualified under federal and state law to drive a commercial vehicle and have received the required commercial driver's license. XPO also sets a higher age limit than the federal minimum. Both truck owners and second-seat drivers must meet XPO's criteria. XPO also requires a driving test. Tr. 394:1–4, 536:7–13, 537:22–538:5, 941:15–20, 943:24–944:21, 1102:10–1104:4, 1179:9–15, 1202:19–1204:1; PX 20, PX 236, PX 274.

(c) XPO Pays for Drivers' Drug Tests and Physical Exams

As part of the onboarding process, drivers must take a drug test and submit to a physical examination. XPO pays for the drug test and medical exam and requires that drivers go to an XPO-approved clinic. In addition to the required drug testing during the onboarding process, XPO also implements a random drug-testing program for all drivers. Tr. 217:11–14, 942:20–943:12, 1101:14–1102:9, 1184:5–1187:12, 1298:3–1299:8, 1464:2–1466:12, 1518:14–1519:7; PX 32 (noting that safety personnel must ensure random drug tests are "completed and sent up" each month), PX 286 at 4.

(d) XPO Requires More than the Law Demands Regarding Medical Cards and Licenses

Even if a driver has a valid medical card when they apply, XPO requires that drivers obtain a new medical card to work for XPO. To get the new medical card, XPO pays for drivers to go to an XPO-approved clinic—drivers cannot choose their own clinic. XPO also requires drivers to renew their medical cards well before they expire. Tr. 1056:12–21, 1185:23–1186:12, 1187:15–1189:1, 1298:3–1299:8, 1363:7–17, 1464:2–16, 1518:14–1519:7.

Similarly, XPO directs drivers to obtain and submit renewed commercial driver's licenses before they expire. In fact, Domingo Avalos was put out of service by XPO well in advance of the time his license expired because he had not submitted paperwork related to a renewal. Tr. 988:9–990:16; PX 87–88.

(e) Drivers Must Sign the ICOC and Are Then Provided with Instructions on How to Do the Work

Once approved, all drivers are also required to sign at least portions of the ICOC—as noted above, truck owners must sign the full agreement and second-seat drivers must sign Schedule K of the ICOC. After signing the contract, XPO instructs truck owners and second-seat drivers on how to do their work. XPO provides drivers with hands-on instruction about the use of the tablet that XPO provides to them for electronic logging, as well as how to use the Intermodal Fleet application. In Commerce, XPO hired driver Hugo Sandoval to conduct training with new truck owners and second-seat drivers on these procedures. Tr. 207:3–7, 282:2–5, 403:7–9, 408:10–410:11; PX 1, PX 2, PX 278, PX 279, PX 280, EX 13.

XPO also collects a number of pieces of information about drivers and their trucks from onboarding drivers. PX 281–82.

(f) XPO distributes work rules and policies to drivers

During the onboarding process, which consists of a multi-hour meeting or multiple meetings, XPO provides drivers with its rules and policies through various handbooks and other materials, which a safety specialist reviews with the driver. The training materials are provided to both truck owners and second-seat drivers. These materials include a safety handbook called Safety Matters, which sets out the safety rules and policies drivers must follow. It includes what procedures to follow in the event that a driver is involved in an accident and rules pertaining to working inside of XPO's yard, among many other things. The Safety Matters handbook is drafted by XPO's corporate office and distributed to both Commerce and San Diego drivers. Tr. 401:17–402:2, 403:13–20, 404:3–6, 695:11–14, 1463:20–1464:1, 1518:2–7; PX 6 at 72:25–73:5 & 74:14–23 & 76:7–17, PX 13, PX 238–40, PX 246, PX 250, PX 269, PX 286.

Drivers are also provided with a HAZMAT booklet and manuals that instruct drivers on how to use the electronic logging device. Drivers are also provided with instructions on how to use the Intermodal Fleet application that dispatchers use to give drivers work and how to scan XPO's required documents. Tr. 207:3–7, 266:1–6, 402:12–22, 1190:4–13, 1463:20–1464:1; PX 1, PX 2, PX 269, PX 279, PX 280.

3. Training and Assessment

In addition to the written materials, drivers also receive instruction through videos they are required to watch during the onboarding process. Drivers must take tests based on those videos and must pass those tests before working for XPO. If a driver has previously worked for XPO and is reapplying, they are required to watch the training videos again and take tests on those videos. The training materials are drafted by XPO's corporate office in Ohio. Tr. 177:2–3,

1099:4–20, 1183:7–13, 1359:18–25, 1443:8–1444:9, 1463:12–19, 1466:17–1468:4, 1517:11-1518:1; PX 249, PX 261 (noting percentage scores by the driver and minimum passing scores).[7]

Even after the initial application process, drivers are required to complete trainings and are tested on the training material. Drivers were recently required to complete a mandatory food safety course about transporting refrigerated food even though XPO drivers do not transport food. These trainings are mandatory and XPO will put drivers out of service (*i.e.*, not permit them to work) if they do not complete the mandatory training. Tr. 1128:20–1130:22, 1248:5–1250:17, 1387:18–1389:1, 1467:2–12, 1527:1–11.

Drivers have also recently been required to complete at least two additional trainings, a safety and a HAZMAT training. After completing the HAZMAT training, drivers are also required to take a test based on the training. If a driver does not complete the HAZMAT training, XPO will place the driver out of service. XPO can terminate drivers for refusing to complete these mandatory trainings. Tr. 1128:20–1129:8, 1248:5-140:16. Tr. 1249:14–1250:17, 1386:6–1387:1, 1527:1–11; PX 247.

Previously, XPO held mandatory safety meetings, requiring drivers to attend meetings instructing them about safety rules and policies. XPO also posted daily safety messages informing drivers about these safety meetings. While these meetings are no longer mandatory, XPO continues to hold the meetings and encourages drivers to attend. Tr. 430:7–9, 439:21–440:7, 1128:20–25; PX 9, PX 22, PX 24, PX 26, PX 256–60, PX 266.

[7] Freeman testified that videos related to the electronic logging device had been discontinued, but an XPO-provided training document shows a driver taking a "course" titled "XPO – KellerMobile for Android ELD Mandate" on January 4, 2022. PX 261. "ELD" refers to the electronic logging device. *See, e.g.*, Tr. 213:22–214:6.

4. XPO's Rules and Discipline

XPO has a points system that it uses to discipline drivers. Drivers accumulate points for violating rules and policies related to safety and inspection of their vehicles and equipment. XPO terminates drivers who accumulate 75 points. The 75-point threshold is not a federal requirement. XPO's point system is more restrictive than the federal CSA point system, which is really an accountability measure so that customers and the public can look up different carriers' safety ratings. In 2021, multiple San Diego drivers were in fact terminated for accumulating too many CSA points. Tr. 477:14–22, 479:17–24, 978:12–979:4, 1072:13–1074:8, 1100:16–1101:7, 1141:4–23, 1167:3–10, 1239:14–1240:12, 1266:5–18, 1324:20–1325:3, 1380:3–15, 1419:18–1421:7, 1475:5–16, 1524:25–1525:8; PX 243, PX 264, PX 285.

XPO's corporate office requires that all drivers comply with XPO's policies, regardless of terminal. Drivers who fail to comply with XPO's policies can be placed on dispatch hold or be subject to termination. XPO is given a safety scorecard that is affected by drivers who have CSA violations or hours of service violations, among other things. Because of this, XPO warns drivers who have these type of violations that affect XPO's scorecard. Tr. 209:8–18.

(a) Terminable offenses

Outside of the point system, XPO also terminates drivers for violating certain rules and policies it has established, even if there are no corresponding federal rules prohibiting drivers from continuing to drive a commercial vehicle for committing such offenses. For example, XPO terminates drivers if they are involved in two preventable accidents in a three-year period; if they are cited for speeding by more than 15 miles per hour; if they commit a felony involving a motor vehicle; or if they leave the scene of an accident—but there are no corresponding federal rules that are restrictive as XPO's policies in these areas. XPO also terminates drivers for having a driving-under-the-influence violation, which is also more stringent than federal or state

requirements. Tr. 396:11–18, 397:15–398:4, 400:4–9, 1421:8–14, 1100:8–16, 1382:4–1383:3; PX 264, 274, 275.

Drivers must report any accidents to XPO on XPO-provided forms and can be terminated if they fail to do so. PX 6 at 95–99, PX 245.

Drivers can also be terminated from XPO for receiving a citation for talking on their cell phone or not wearing their safety belt while driving. XPO will terminate drivers if they drive a chassis with a punctured tire. Tr. 979:5–10, 1100:8–16, 1240:13–1241:7, 1382:4–1383:3, 1421:8–14.

XPO will also terminate drivers for being cited for violations that do not involve the use of a commercial vehicle. For example, if a driver receives a speeding ticket in their personal vehicle, they can be terminated. XPO can also terminate a driver who has issues with dispatchers, such as being disrespectful to dispatchers. The decision to terminate a driver appears to be made by XPO's corporate office. Tr. 1240:13–1241:7, 1382:4–1383:3, 1526:9–25.

These reasons for discharge are not merely theoretical. XPO in fact discharged multiple drivers in 2021 for speeding, log violations, falsification, refusal to test, failure to report an accident, and for having two preventable accidents. PX 284, PX 285.

(b) Out of service/dispatch hold offenses

XPO also uses a disciplinary system in which it suspends drivers by putting them out of service or on dispatch hold for failing to comply with XPO's rules, such as daily submission of electronic logs. Being on a dispatch hold is the same as being out of service—it means that XPO has suspended that driver and they will not be allowed to work until XPO removes the dispatch hold or puts them back in service. Tr. 1325:11–20, 1383:4–21.

XPO will place drivers on a dispatch hold for being involved in a preventable accidents, until XPO can conduct an in-depth investigation. XPO requires that drivers immediately notify

XPO about any accidents they are involved in and that they file an accident report with XPO's safety specialists after every accident. Second-seat drivers must report accidents directly to XPO. Tr. 453:10–21, 486:8–12, 1131:23–1132:12, 1391:8–1392:3, PX 38, PX 245.

(c) Inspection Requirements

XPO requires drivers to complete multiple inspections. Drivers must complete daily pre- and post-trip inspections and submit inspection reports using their tablet. Drivers are also required to complete a monthly inspection. If a driver does not complete the monthly inspection report and submit it to XPO, they will be placed on a dispatch hold. XPO also requires that drivers submit receipts along with their monthly inspection report demonstrating that they have completed maintenance and repairs on their truck. Tr. 480:6–8, 807:8–18,[8] 991:24–992:8, 1242:2–7, 1245:2–1246:3, 1325:4–1326:4, 1383:4–1385:13, 1477:1–1478:10; PX 235, PX 241, PX 248.

Drivers are also required to complete 90-day inspections. The 90-day inspections must be completed with the mechanic who XPO designates and drivers cannot go to their own mechanic. If a driver fails to complete their 90-day inspection and submit an inspection report to XPO, XPO will place the driver on a dispatch hold. XPO pays for these inspections. In San Diego, the 90-day inspections are done at XPO's yard. Tr. 991:24–993:14, 1131:5–15, 1246:24–1248:4, 1325:4–1326:4, 1326:25–1327:24, 1383:4–1385:13, 1477:1–1478:10.

If the California Highway Patrol conducts a roadside inspection of a driver's truck and equipment, the driver must send a report of that inspection to XPO on an XPO form even if no violations are found. PX 241.

[8] The transcript's rendition of the testimony as "three trip inspection" is clearly an error—the witness was discussing the same *pre*-trip inspection that other drivers testified about.

(d) Electronic Logging Devices and Logbook Rules

Drivers are required to submit daily logs to XPO at the end of every shift detailing the work they have done that day. Drivers submit their logs electronically using the tablet that XPO provides to them. Drivers are also expected to carry a paper log as backup. Under XPO safety policy, drivers who are authorized to use paper logs can only do so for eight days in a 30-day rolling period. Tr. 495:10–24, 496:21–24, 1101:11–13, 1228:14–24, 1375:19–22; PX 276.

XPO monitors drivers and their missing logs through the J.J. Keller system and will warn drivers that they must submit their daily logs or risk being placed on dispatch hold. If a driver fails to submit their logs, XPO will place them on a dispatch hold. Tr. 455:15–18, 456:7–10, 1132:6–8, 1525:17–1526:8; PX 89–91, PX 217–20, PX 229–32.

Even on days when drivers are not working, they must submit their logs. If a driver leaves the country or goes on vacation and fails to submit logs on those days that they are out, they will be placed on a dispatch hold for failing to submit their logs. During the pandemic, when drivers were not working regularly, XPO still required that drivers submit their logbooks even when they were not working. If they did not submit their logbooks, they would be placed on a dispatch hold. Tr. 455:19–456:3, 1477:1–1478:10, 1525:17–1526:8.

(a) Other XPO Rules

XPO has a rule requiring drivers to wear their vest inside its yard at all times. If a driver does not wear the vest while they are in the yard, they will be suspended for a 24-hour period. Tr. 1100:8–11, 1327:25–1328:18.

XPO requires drivers to scan and submit physical copies of the paperwork they use as part of their work. Drivers are required to submit a manifest that details all of the work that a driver has done in one day, a hand ticket that has the information about the cargo that a driver transports, and a bill of lading. Drivers are required to scan the hand tickets and manifests and

send them to XPO. Drivers are also required to physically submit these documents to XPO at XPO's yard. Tr. 852:11–15, 945:23–946:5, 991:1–13, 1126:8–1127:10, 1227:16–1228:13, 1320:14–1321:25, 1376:23–1377:10; PX 276–77.

XPO also requires that all drivers take dispatch at least once in a rolling 35-day period. If a driver goes more than 35 days without completing an assignment, XPO will terminate them. XPO's rule applies even when a driver plans to return to work for XPO and is out because they are sick. Multiple drivers were discharged at each location in 2021 for violating this rule. Tr. 301:19–23, 1508:14–25; PX 284–85.

XPO also conducts random inspections at its gate and at railroad terminals. During these inspections, XPO will ask drivers questions and inspect their truck. If XPO finds any violations, drivers will be required to fix those violations. Tr. 214:7–215:5.

5. Compensation Structure

(a) Schedule B rates set by XPO and are not negotiated

Every quarter, XPO issues a new Schedule B to the ICOC, setting the line haul rates it will pay to drivers for transporting its customers' loads. The Schedule B is already drafted when presented to drivers. Drivers cannot negotiate the rates that XPO pays for a load. Drivers have unsuccessfully tried to negotiate XPO's rates, but XPO does not negotiate with drivers. Tr. 244:15–22, 1125:10–1126:7, 1238:1–9, 1322:1–20, 1377:11–21, 1446:6–11; EX 6–7, PX 268.

In addition to the line haul rates, XPO offers drivers "unplanned" premiums for completing certain loads. XPO provides these premium payments as an incentive for drivers to complete certain loads. The prices for those premiums are set by XPO. XPO decides which loads to provide premiums for and the amount of those premiums, based on its need to cover certain loads. Drivers do not in reality negotiate premiums, though XPO claims they are negotiable. XPO does not allow drivers to negotiate premiums because those rates are already

predetermined. When drivers have tried to seek premiums, XPO tells drivers that the rates are already set. Second-seat drivers are also offered premium pay, but they are also unable to negotiate the premium amount with XPO. Tr. 227:8–13, 326:4–12, 714:14–17, 763:12–18, 1089:13–19, 1125:10–1126:7, 1332:2–25, 1446:17–1448:4, 1473:17–1474:16; EX 6–7, PX 289–90.

The "unplanned" premiums, *i.e.* those not already provided for in the Schedule B, make up a very small part of overall driver compensation. XPO data shows that over two sample weeks toward the end of 2021, unplanned premiums made up just 3.5 percent of total driver compensation ($59,931.82 out of $1,673,412.97). A substantial number of drivers receive no unplanned premiums at all in any given week despite earning substantial compensation in that week. The vast majority of unplanned premiums are paid on just a handful of "lanes," and the quarterly adjustment to the Schedule B that takes unplanned premiums into account means that in the next quarter, those lanes that had significant premiums are unlikely to have them again because the premiums will essentially be "rolled into" the line haul (base) rate. PX 289–90, EX 11A at 5–6, EX 135 at 8–11, EX 138.

6. Dispatch

(a) Drivers receive, and generally do not reject, work from dispatchers

XPO's dispatchers assign work to drivers on their tablet or mobile device using the mobile application Intermodal Fleet. Dispatchers decide what work they will send to each driver. XPO sometimes, but rarely, provides drivers with the option to choose what work they want to do. XPO sets appointment times for certain loads and drivers assigned to those loads do not have the ability to change those appointment times. Tr. 39:10–25, 155:21–156:3, 946:15–947:5, 960:10–19, 1317:17–1318:18, 1375:19–1376:1.

At both the Commerce and the San Diego yard, prior to the pandemic, drivers were required to go into the terminal to put their name on a list; dispatchers would assign them work based on that list. Drivers needed to wait at the facility until XPO assigned them work. Since the pandemic, XPO created a pre-plan dispatch system at both facilities, where drivers are required to send a text message to the dispatchers providing them with their schedule for the following week. If a driver does not sign up for pre-plan, they might not have work assigned during the following week. In San Diego, drivers who do not sign up for work ahead of time are required to go into the facility to put their name down on a list, and will be placed last on the list and assigned work after everyone else is dispatched. Also in San Diego, drivers who work during the night must sign up for a "prelist" the day before they will be receiving work, but there is not always work under the prelist. Tr. 260:22–261:21, 1086:7–16, 1219:3–12, 1315:12–1316:24, 1372:12–1374:18, 1468:14–1469:21.

In Commerce, drivers can also try to get work on a daily basis by sending a text message to the dispatch team one day in advance. Drivers can also get work using the off-shift plan, where drivers will get a message to receive work on a daily basis and must respond to that message in order to receive work. Tr. 960:10–961:17, 1468:14–1469:21.

XPO dispatchers are constantly monitoring the loads that they assign to drivers. Once a driver is assigned a load, they must begin the assignment within two hours of being dispatched or XPO will take the assignment away and give it to another driver. Dispatchers also have the ability to look at a driver's work history and the work they have been assigned. Tr. 501:2–14; 965:3–6, 1317:23–1318:16, 1375:23–1376:7; *see also* PX 283 (advertising delivery tracking to XPO's customers).

A consequence of a San Diego driver rejecting an assignment is that the driver will be required to return to the San Diego terminal from Los Angeles bobtail, without a load, and for no pay. There is also no guarantee of when or if they will receive another assignment. As a result, drivers do not typically reject loads: Over the last six months in Commerce, just 0.38 percent of offered loads were rejected by drivers, while in San Diego the figure was only 5.29 percent. Tr. 961:18–962:8, 1470:14–1473:8, 1520:21–1522:15; PX 291.

7. Truck Owners and Second-Seat Drivers Do the Same Work at Both the Commerce and San Diego Facility

Truck owners and second-seat drivers do the same work—they transport XPO's customers' loads. Both are dispatched by XPO's dispatchers in the same way and provided with the same type of work. Working conditions for truck owners and second-seat drivers are the same. Drivers strictly do driving work and do not unload the containers they transport—in fact, in most of their work, they do not even need to wait for the trailer to be unloaded but instead perform "drop and hook" where they drop off one load and immediately pick up another. Tr. 794:10–795:14, 813:6–10, 935:5–14, 954:6–10, 959:12–20, 1122:15–1123:8, 1207:10–18, 1294:11–12, 1307:18–21, 1372:3–11.

Drivers do not transport loads outside of the United States. The only meaningful difference between the work that San Diego and Commerce drivers do is the customers they make deliveries for, which has an effect on the average length of haul in the two locations, but many drivers in Commerce work in "lanes" that are very similar in distance as the San Diego-to-Los Angeles "lane" that makes up the vast majority of San Diego's work. Even drivers transporting loads for the same customers may be required to go to different locations to transport specific loads. Tr. 219:14–21, 241:20–242:16, 862:25–863:18, 868:25–869:2.

8. Truck Owners Do Not Dispatch Second-Seat Drivers

XPO dispatchers assign work directly to second-seat drivers. Truck owners are not involved with any aspect of the dispatch process for second-seat drivers. Second-seat drivers must communicate directly with XPO dispatchers regarding their assignments. Regardless of whose truck a second-seat driver uses, they do the same work. If a second-seat driver has a problem with a load, they must communicate directly with XPO, not the owner. For example, if a second seat driver is running late to deliver a load, they must inform XPO. Tr. 945:5–22, 954:6–10, 964:14–965:6, 975:9–14, 1369:8–12, 960:10–19.

To connect truck owners and second-seat drivers, XPO asks truck owners to inform XPO if they have space for a second-seat driver. XPO maintains a list to connect second-seat drivers to truck owners. Tr. 944:7–945:1, 1204:2–1205:11; PX 234.

9. XPO Tracks Drivers

XPO tracks drivers while they are delivering loads. XPO knows when a driver is picking up and dropping off a load. Dispatchers often inform drivers that they are aware of drivers' locations. For example, dispatchers are aware when a driver is running late to an appointment, even if the driver does not inform XPO. Tr. 211:9–23, 213:22–214:6, 963:9–21, 965:3–9, 1227:2–15, 1320:7–13, 1376:13–22; PX 283.

D. Drivers Do Not Have Independent Businesses

1. Drivers Work for XPO Using XPO's Operating Authority

Even for drivers who have their own federal operating authority, XPO prohibits drivers from using that authority to work for XPO and instead mandates usage of XPO's operating authority. Tr. 832:16–833:9, 996:9–15, 1254:13–1255:19, 1305:11–1307:17.

2. Driver Corporations Are a Sham and Drivers Do Not Have their Own Businesses

XPO has encouraged drivers to form limited liability companies and corporations by providing drivers with incentives to form those entities. XPO has told some drivers that they must form a corporation to work for XPO. It has also provided drivers with financial incentives and information on where to go to form these corporations. PX 228, PX 252, PX 254.

Drivers' LLCs and corporations are not capitalized, lack assets and stocks, and do not have any employees. These corporations are generally only used for the work that drivers do for XPO and not to work for any other company or customer.[9] Drivers with LLCs do not have their own clients or advertise their services as truck drivers. PX 228.

Regardless of whether a driver formed a corporation or works for XPO under their name, the work that drivers do is the same. After forming the corporation, drivers continue to do the same exact work for XPO, transporting loads for XPO customers. PX 254.

3. Drivers Work Exclusively for XPO

XPO drivers are long-term employees who work for XPO year-round. Some drivers that testified have been working exclusively for XPO and its predecessor for a decade. XPO drivers do not work for any other company while working for XPO. They do not advertise their services as truck drivers and do not deal directly with customers (and even second-seat drivers deal with XPO when issues arise more than they do the owners of the trucks they are driving). Tr. 909:4–5, 998:2–12, 962:9–963:8, 998:2–7, 1097:1–2, 1180:16–1181:5, 1319:1–5, 1376:8–12, 1418:4–11, 1473:9–17, 1523:25–1524:10.

[9] The sole exception in the record is that driver Rodney Moore uses his LLC—which he formed before he even became a truck driver, much less before he came to work for XPO—for his personal chef business.

4. XPO Provides the Instrumentalities Necessary for Drivers to Do their Work

XPO provides drivers with the instrumentalities they need to do their work, including the chassis and containers that they use to move customer loads. Drivers are provided with parking inside of XPO's facilities. XPO gives drivers the tablet that it requires drivers to use for logging and to receive assignments from XPO's dispatchers. Tr. 240:22, 770:2–10, 1294:23–1295:22, 1379:18–23; EX 10 (photographs showing XPO containers at San Diego yard).

Drivers must place large placards on both sides of their truck with XPO's logo and XPO's federal and California DOT numbers. These decals are provided by XPO and identify drivers as XPO drivers. XPO also supplies drivers with apportioned plates for drivers that do interstate work. XPO distributes apportioned plates centrally from its corporate office in Ohio. Tr. 297:21–298:7, 996:16–24, 1121:10–16, 1145:17–1146:7, 1398:11–18; PX 221 & Tr. 1139:5–16; PX 242, PX 271.

XPO issues fuel credit cards, called a Comdata card after the company that XPO corporate contracts with for the cards. The Comdata card provides a discounted fuel rate at participating gas stations for drivers. XPO also gives drivers the documents they need to do their work, including blank manifests and hand tickets. Tr. 339:8–341:4, 1228:7–9, 1377:9–10.

XPO also provides drivers with insurance at a discounted rate through a company called BizChoice. Because XPO has strict requirements regarding the type of insurance coverage that drivers must obtain, most drivers use XPO's insurance to work for XPO. If a driver uses XPO's insurance, they cannot use it to work for another company. XPO has certain requirements for the insurance that drivers must use to work for XPO. Insurance requirements are company-wide, set by XPO's corporate office. Most drivers obtain insurance through XPO. XPO coordinates driver

insurance centrally from Ohio. Tr. 297:18–25, 411:17–21, 412:18–22, 769:2–17, 843:23–844:4, 1453:10–19; PX 265.

5. XPO Controls Drivers' Truck Use

Although drivers provide their own truck to work for XPO, XPO controls who can drive these trucks—a driver with two trucks cannot choose which truck he wants to drive without first seeking authorization from XPO; they must drive the single truck that they applied to XPO to drive with. XPO encourages and incentivizes owners to get more than one truck (despite there being no clear advantage to XPO in owners having more than one truck beyond strengthening the illusion that the drivers are independent contractors). Similarly, a driver who has more than one truck cannot choose to switch the truck that a second seat driver uses without first obtaining XPO's approval. XPO will not assign work to a driver who is using a truck that they are not authorized to use. Tr. 868:3–16, 900:13–901:7, 948:14–949:10, 1025:13–23, 1199:23–1200:5, 1201:7–10, 1313:7–22, 1367:7–1369:2.

6. Drivers Believe They are Employees

Many truck owners and second-seat drivers believe—based on the facts discussed above—that they are employees of XPO irrespective of the label XPO attempts to place on the relationship. Tr. 942:16–943:6, 1389:11–15, 1480:5–25, 1529:4–16. As described below, numerous drivers have filed (and prevailed on) legal claims of various types premised on their belief that they are employees.

E. Prior Determinations of Employee Status

In addition to the ALJ decision currently pending before the Board that found XPO drivers to be employees, numerous other decisions have found unit drivers, both owner and second-seat, to be employees in various probative contexts. PX 222 (2019 Superior Court decision under state wage and hour law); PX 223 (2017 state Labor Commissioner decision

under state wage and hour law); PX 228 (2021 unemployment decision finding driver employed by XPO, not his own entity), PX 251 (2021 unemployment decision reversing finding that driver was employed by his own entity); PX 252 (similar to PX 228); PX 253 (same); PX 254 (same); PX 255 (same).

Moreover, a federal court certified a class consisting of both San Diego and Commerce drivers in a wage and hour class action in 2020. PX 225–27.

F. Interchange Between Commerce and San Diego Terminals

1. Interfacility Assignments

Despite the Employer's claims that "[t]here is no operational relationship" between the Commerce and San Diego terminals, the record shows ample evidence of operational overlap and employee interchange between the two facilities. Numerous drivers testified that at various points throughout the last several years, they had hauled loads from one terminal, while being officially assigned to another. Currently, some drivers take excess loads from the other facility as often as "once or twice a month." Even for those drivers who are not currently hauling loads from both Commerce and San Diego, some drivers were doing so as late as December 2021. This testimony from multiple drivers contrasts sharply with Freeman's uncorroborated assertion that such interchange between terminals only happens in "emergency situations." Tr. 90:5, 353:1:12, 993:15–995:12; 1143:22–1145:8, 1210:10–23, 1331:14–18, 1422:5-1423:7.

2. Interfacility Load Transfers

In addition to the regular interchange of drivers nominally assigned to only one terminal, XPO company policy results in the frequent transfer of loads between the two terminals in question. Once a load is transferred, the transferred load appears on the transferee's dispatch documents. The most common circumstance triggering such transfers involves overweight loads dispatched from one facility being rerouted to another facility for rebalancing and adjustment.

Two drivers testified that such interfacility "adjustment" takes place "once or twice a month" at least. The purpose of such load adjustment is to minimize delay and cost associated with trucks carrying overweight loads being detained at CHP scales along their route. XPO contracts with specific vendors, at significant expense, to ensure such interfacility coordination happens smoothly. Tr. 698:1-14, 1330:19–1331:18, 1528:4-8, 1528:24–25, 1645:2–10.

3. After-Hours Dispatch Coordination

XPO uses an Ohio-based team of after-hours dispatchers to coordinate shipments nationwide. Between the hours of 11 pm and 5 am, there are no available dispatchers in San Diego, so drivers are instructed to call the Dublin office, where there are "off-shift dispatchers that service the entire company – or entire country." For the Commerce terminal, the off hours are 8 pm to 5 am. Before the COVID-19 pandemic, the company would instruct San Diego based drivers to contact after-hours dispatchers at the Commerce facility. During the pandemic, XPO reduced its in-person staff at terminals, and shifted all after-hours dispatch call to its Ohio staff. Because drivers are transporting cargo 24 hours a day, contact with Ohio dispatch is a regular occurrence for many drivers in both locations. Tr. 1221:1–25, 1631:6–13, 1642:12–13.

III. Argument

A. The Union's Petitioned-For Unit is Appropriate

Although the question of whether the drivers in the petitioned-for unit are employees or independent contractors is a threshold question determining whether these drivers are covered by the Act, the nature of the appropriate unit analysis makes it prudent to first examine that issue. After all, if there are sufficient similarities in working conditions and centralized control between the facilities and drivers at issue, the employee status analysis will apply across the Board rather than necessitating a separate employee status analysis for each facility and driver.

Here, the Union has petitioned-for a unit made up of the drivers—truck owners and second-seat drivers—operating out of the Employer's San Diego and Los Angeles locations. While the Board has long recognized a single-facility presumption, the Board does not apply that presumption where the union petitions for a multifacility unit, even if the employer argues that single-facility units are the appropriate ones—as the Employer did here. *Capital Coors*, 309 NLRB 322, 322 fn. 1 (1992) (citing *NLRB v. Carson Cable TV*, 795 F.2d 879, 886–87 (9th Cir. 1986)). Instead, the Board applies the traditional community-of-interest test, with a focus on "the following community-of-interest factors among employees working at the different locations: similarity in employees' skills, duties, and working conditions; centralized control of management and supervision; functional integration of business operations, including employee interchange; geographic proximity; bargaining history; and extent of union organization and employee choice."[10] *Exemplar, Inc.*, 363 NLRB 1500, 1501 (2016) (citing *Clarian Health Partners*, 344 NLRB 332, 334 (2005); *Bashas', Inc.*, 337 NLRB 710, 711 (2002); *Alamo Rent-A-Car*, 330 NLRB 897, 897 (2000)). Further, as in other contexts, "[i]t is well settled that a petitioned-for unit need only be *an* appropriate unit, not the only or the most appropriate unit." *Id.* (citing *Specialty Healthcare & Rehabilitation Ctr.*, 357 NLRB 934, 940 (2011), *enfd. sub nom. Kindred Nursing Ctrs. E. v. NLRB*, 727 F.3d 552 (6th Cir. 2013).

1. Skills, Duties, and Working Conditions

From a skills and duties perspective, the drivers at the two locations do exactly the same work—they use trucks to move containers on chassis from a pickup location to a drop-off point. *See, e.g.*, Tr. 70:1–2 (Tibbetts). The drivers all have the same California commercial driver's

[10] Here, there is no relevant bargaining history between the parties, so the bargaining history factor is neutral. *See, e.g., Trane*, 339 NLRB 866, 868 fn. 4 (2003) ("Here, the Employer has no bargaining history whatsoever. The complete absence of bargaining history is at most a neutral factor in the analysis.").

license and have the same particular commercial truck driving skills that differ from driving a normal car (*e.g.* usage of air brakes). San Diego and Commerce drivers clearly can (and, as described below, do) substitute for each other when necessitated by XPO's business needs—the differences between the San Diego and Commerce work do not create any difference in the skills required to perform that work. *See, e.g.*, *Exemplar*, 363 NLRB at 1502 (finding the skills and duties of office-building janitors were identical notwithstanding differences between the work at the two buildings in question). In *R & D Trucking*, 327 NLRB 531 (1999), the Board found not only that a multifacility unit was appropriate, but that the single-facility presumption had been rebutted, because, *inter alia*,

> [a]ll drivers load and unload freight, and all drive trucks. They are all required to have identical certifications and licenses, and no additional training was necessary for employees stationed at Textron. Clearly, they are qualified to substitute for one another as needed. That the employees stationed at the Interstate facility deliver freight to other customers while those stationed at Textron remain on Textron's premises is not, we believe, a factor that outweighs the similarity of their interchangeable skills and functions.

Id. at 532. Thus, here, where the Union does *not* need to overcome a presumption, the skills and duties factors strongly support finding the multifacility unit is appropriate.

Relatedly, the working conditions at the two locations are far more similar than different. Drivers are paid on the same *basis*—a mileage rate plus fuel surcharge and occasional premium payments—and the mileage rates are largely identical. From 5.1 to 65 miles, the base rate of pay is identical at the two facilities for a loaded container (the most common type of work assignment). *Compare* EX 6, p. 3 *to* EX 7, p. 3. The rates at higher mileage differ by only about 10 to 17 *cents* per mile. *Id.* The fuel surcharge payments are made at an identical rate. *Compare* EX 6, p. 5 *to* EX 7, pp. 4–5. Many of the so-called "planned premiums" laid out in the respective Schedules B are also identical, and where they differ, the differences are not stark. *Compare* EX 6, pp. 6–8 *to* EX 7, pp. 5–7.

Due in part to XPO's significant centralized control, discussed below, and in part to XPO misclassifying the drivers as independent contractors, also discussed below, many other terms and conditions of employment are also identical. Most notably, outside of the minor differences in Schedule B discussed above, owner-drivers must sign exactly the same ICOC, and second-seat drivers at both locations are subject to the same standards to be hired/approved to drive by XPO. PX 20, PX 21. Drivers at both locations receive no retirement, health, or other fringe benefits. Drivers at both locations are subject to the same disciplinary standards pursuant to XPO's company-wide application of a standard that results in discharge for any driver who exceeds 75 CSA points. PX 264. Drivers have access to the same insurance program to purchase insurance for their trucks. Drivers are subject to the same safety rules, via the XPO-wide Safety Matters handbook. *See generally* PX 286. Drivers use the same technology in their work, including the XPO-provided logging tablet and software, as well as the XPO-mandated Intermodal Fleet dispatching software. PX 1, PX 2 (Intermodal Fleet Instructions).

The small differences in working conditions between Commerce and San Diego are essentially attributable to the different customer bases at the two locations. In San Diego, most of the work comes from a single, cross-border customer (but the San Diego drivers do not themselves cross the border) which results in the daily work largely being a single trip to and from San Diego yards and Los Angeles–area rail terminals to pick up and drop off containers. At Commerce, by contrast, the customer base is more diversified, resulting in a variety of potential route lengths and pickup/drop-off locations. That diversity of work is more akin to the different types of cleaning that occur at the two buildings in *Exemplar*, 363 NLRB at 1502, than to any truly different set of working conditions. Whether a driver takes a loaded container from a rail yard in Los Angeles to a customer 10 miles away or to the San Diego XPO yard, the fact is that

the drivers must accomplish that task the same way: by safely and appropriately pulling a chassis with a container from point A to point B, abiding by legal and XPO regulations, and doing so within the time assigned by the customer and XPO. In particular, while drivers might sometimes know who the customer is that they are pulling a load for, they have no contact whatsoever with those customers, and there is no evidence that they do their jobs any differently depending on whether they are hauling containers of clothing, electronics, or anything else. Indeed, this is one of the premises of the containerization of the shipping industry—a container is a container is a container from the perspective of the trucks, trains, and ships on which those containers are shipped, and thus from the perspective of the drivers of those trucks.

In short, the skills, duties, and working conditions of San Diego and Commerce drivers are essentially identical, and this factor strongly supports finding the Union's petitioned-for multifacility unit appropriate.

2. Centralized Control of Management and Supervision

XPO exercise substantial, even overwhelming, centralized control over the driver workforces at Commerce and San Diego; this factor of the test strongly supports finding the multifacility unit appropriate.

In analyzing this factor, it is important to note first that all the drivers at issue here engage in intermodal transport for XPO. As several Employer witnesses testified, the essential nature of intermodal transport *necessitates* centralized control. XPO is responsible for moving freight across great distances, connecting trucks, ships, and trains to manage timely, affordable delivery of goods to the satisfaction of its customers in the competitive landscape of intermodal shipping. *See, e.g.,* EX 3 (illustrating a single intermodal move of a container across the country). Managing all of this successfully and profitably requires coordination of XPO's national

operations to a degree that simply does not permit local autonomy to any significant degree. *See* Tr. 43:15–45:5, 47:14–48:13 (Tibbetts).

As a result, the *only* significant local control relevant to the drivers is that dispatch is, by and large, handled by dispatchers at each of the two locations. Every other aspect of XPO's operations that relates to drivers' work is tightly managed and controlled at the corporate level.

This control begins with customer contracting, which is handled centrally, not at the local level. Tr. 46:23–24 (Tibbetts). Further, intermodal moves of containerized goods require active coordination from headquarters throughout the process of those moves, Tr. 44:6–46:18 (Tibbetts), and the local terminals receive information on what loads they need to handle from the corporate level, Tr. 414:4–12 (Freeman). Every move is assigned an XPO-wide unique identification number, not a local number that would indicate local autonomy. *See, e.g.*, PX 287 & 288 (reflecting lists of dispatches extracted from XPO data system, including a "Dispatch#" column). The entire organization thus relies on custom-built software for management of its operation, including Rail Optimizer (which the dispatchers and planners at the local terminals use) and Intermodal Fleet (which is used to dispatch work to the drivers).

Regarding driver employment, centralized control begins with driver recruitment, which is handled by a team at headquarters in Ohio. Tr. 614:19–22 (Limuaco). This includes the drafting of job ads for drivers. Tr. 378:5–7 (Freeman). Indeed, the Commerce and San Diego facilities do not employ any staff who work in recruiting. *See* EX 8 (Commerce organizational chart); EX 32 (San Diego). Qualifications for hire as a driver do not differ, and are instead set by headquarters. *See* PX 274 (list of qualifications). Background checks for new drivers are also handled by headquarters. *See* PX 262; *see also* Tr. 1297:21–25 (Vasquez re: being contacted by headquarters to verify information on his job application).

Similar to the lack of recruiting and business development staff at the local level, accounting and finance functions are also performed centrally—San Diego and Commerce are reflected on separate tabs of a nationwide spreadsheet of profit and loss statements, but those statements are developed at headquarters and sent out to the local facility managers, not vice versa. Tr. 377:12–25 (Freeman).

While onboarding of new drivers occurs in-person at the San Diego or Commerce terminal, the *content* of that onboarding is entirely centralized. New owner-drivers sign the same ICOC as drivers everywhere else in the country, and new second-seat drivers sign Schedule K to the ICOC. The ICOC is drafted and maintained by legal staff at headquarters. Tr. 379:18–380:1 (Freeman). Safety videos are handled through the XPO-wide JJ Keller portal. *See* PX 261. As described above, safety and other manuals given to the drivers either at onboarding or later are developed and maintained centrally. *See, e.g.*, PX 286 (Safety Matters); PX 279 & 280 (Intermodal Fleet instructions); PX 269 (hazardous materials booklet); Tr. 466:16–23 (Freeman re: tenstreet document repository). XPO also maintains a company-wide safety program with protocols set by headquarters. Tr. 304:24–305:1 (Freeman). For instance, weekly Wednesday safety calls are offered to the entire Western Region, of which Commerce and San Diego are a part. Tr. 439:14–16 (Freeman re: safety calls); 37:2–18 (Tibbetts re: Western Region); PX 266.

While, as noted above, the pay rates differ slightly from Commerce to San Diego because the Schedule B for each terminal contains slight variations in the mileage rates, the quarterly revised Schedule B is issued by headquarters, not the local facilities. The local terminals can *ask* headquarters for revisions based on local experience, but there is no evidence that such requests are heeded, much less that they amount to effective recommendations. Therefore, pay is

managed centrally. The same is true for referral and sign-on bonuses, which can be responsive to local conditions, but must be determined or approved by headquarters. Tr. 379:1–14 (Freeman).

As noted above, drivers at all XPO locations have access to the same insurance programs, which are managed centrally between XPO and McGriff Insurance/Biz Choice. *See* PX 265. The minimum requirements for insurance are set at headquarters. Tr. 411:17–21 (Freeman). Work rules are also set centrally, including the 75-point threshold for a driver's CSA score that will cause XPO to fire them, as well as the rule that if a driver goes 30 or 35 days without taking at least one dispatch, XPO will discharge them. Similarly, drivers are given the same "Comdata" fuel cards to fuel their trucks.

Performance of drivers' work—aside from the receipt of dispatch from local dispatchers—is also substantially subject to centralized control. Drivers must submit logs through the same tablet and the same JJ Keller application, and the XPO–JJ Keller relationship is maintained nationally. Tr. 292:18–24 (Freeman). Further, even though drivers can and do operate 24 hours a day, 7 days a week, XPO does not require the local terminals to maintain dispatcher coverage at all hours—instead, during the overnight hours, drivers call a centralized dispatch team if they have any problems regarding a load. Tr. 1221:13–20; 1631:6–13; 1642:12–13.

Weighing the substantial—and entirely necessary to its line of business—centralized control over nearly every aspect of the drivers' work against the mere fact that dispatch on a per-driver basis is handled locally shows that the centralized control factor strongly supports the appropriateness of the petitioned-for multifacility unit.

3. Functional Integration, Employee Interchange, and Geographic Proximity

XPO attempted to paint a picture at the hearing that Commerce and San Diego are completely separate terminals with separate businesses and separate pools of drivers. XPO

completely ignores that there is a substantial degree of functional integration and employee interchange such that this factor favors finding a multifacility unit appropriate.

As noted above, the main work of the San Diego facility involves trips to and from the Los Angeles area, including the same Los Angeles railyards to and from which Commerce-based drivers pull loads. *See, e.g.*, Tr. 1210:10–23. Drivers traveling to and from San Diego pass a truck scale, so it is important that the loads the drivers are pulling on that lane not be overweight or out of balance. Therefore, San Diego drivers with overweight loads picked up in the Los Angeles area take them to the Commerce yard for rebalancing or other adjustments. Tr. 1330:19–1331:13; 1528:4–8. Two drivers testified that they do this one or two times a month. Tr. 1331:14–18; 1528:24–25. There is no evidence that, for instance, the San Diego drivers pay the Commerce facility for this service, or that one terminal makes any payment to the other related to these adjustments. This is a strong indication of functional integration of the two facilities: XPO plainly views its role as making use of whatever facility is best-suited to move its customers' goods and comply with legal regulations, irrespective of whether the move technically originates from the San Diego or Commerce facility. (After all, the moves *actually* originate from customer contacts managed centrally, at headquarters, and are pushed out to the local facilities for local dispatch. The integration of the two Southern California facilities in this respect is a sensible consequence of that centralization).

There is also substantial record evidence that XPO has used San Diego drivers to cover for bulges in work at Commerce, and vice versa. *See* Tr. 993:15–995:12 (Avalos, Commerce driver: period of one to two years when he pulled two to three loads per week from San Diego); 1143:19–1145:8 (Alvarez, Commerce driver: period of six months when he and his father pulled 10 loads per week from San Diego); 1331:14–18 (Vasquez, San Diego driver: picks up

containers from the Commerce yard once or twice a month); 1390:5–8 (Ramirez, San Diego driver: occasionally picks up and drops off containers at the Commerce yard); 1422:5–1423:7 (Rosales, Commerce driver: he and his partner have called San Diego dispatch for work and received it as recently as December 2021).

The facilities are, as Employer witness Mark Darling insisted on mentioning repeatedly, whether or not he was asked, 132 miles apart. Were the subject enterprise a retail or manufacturing concern, this distance would be quite significant. In the context of a transportation company, however, the Board has recognized that where, as here, there is not a physical workplace or office at which employees work,[11] and where the areas covered by the two locations "are only loosely defined by fluid lines of demarcation," the Region should not place too much emphasis on either physical distance or a great deal of employee interchange. *Trane*, 339 NLRB at 868. As in *R & D Trucking, supra*, the Board in *Trane* found that the employer had rebutted the single-facility presumption by presenting evidence of "centralized control over daily operations and labor relations; lack of local autonomy; common supervision; identical skills, duties, and other terms and conditions of employment; and contact between" the two locations, and that those factors "outweigh[ed] the geographic distance and the lack of specificity as to the level of interchange." *Id.* (citing *Waste Mgmt. Nw.*, 331 NLRB 309 (2000)). *Waste Management* is to the same effect. 331 NLRB at 309 ("We find that the functional integration of the Employer's operations; centralized control over personnel and labor relations policies; lack of local autonomy and common supervision of employees at both locations; identical skills, duties,

[11] In particular, the company has discouraged drivers from visiting the terminal more than necessary during the pandemic period, Tr. 1372:14–1373:4, and has implemented technology and operations solutions that will maintain a very "remote" workforce of drivers even as in-person activities become safer.

and other terms and conditions of employment; and the evidence of interaction and coordination between these two groups outweighs two factors which would favor the single-facility presumption—the 42-mile geographical distance between the two locations and the Employer's failure to introduce relevant affirmative evidence demonstrating more than minimal interchange.") (citing *R & D Trucking*, *supra*).

Thus, where, as here, the Union is seeking a multifacility unit and is not required to overcome the single-facility presumption, *R & D Trucking*, *Trane*, and *Waste Management* point clearly toward the appropriateness of the two-facility unit.

4. The Region Must Order an Election in the Petitioned-for Unit

For the foregoing reasons, all the evidence at the hearing shows that a multifacility unit is an appropriate unit in this case. In particular, there is an overwhelming amount of centralized control, including of labor and employee relations issues. Likewise, the skills, duties, and conditions of employment at San Diego and Commerce, and of truck owners and second-seat drivers, are practically identical. These factors, along with the fact that XPO plainly treats San Diego and Commerce as a functionally integrated Southern California intermodal trucking operation (including by assigning work across facility lines), are more than enough to overcome the fact that the facilities are geographically somewhat distant, particularly in light of the fact that San Diego drivers come to the Los Angeles area for work every single day. A 132-mile distance might be a lot for many jobs, but for truckers, it is a blip in a profession that sees drivers covering many thousands of miles every year. Therefore, the Region must order an election in the Union's petitioned-for two-facility unit.

B. Drivers Are Employees Under the Act

The burden of proving that a worker falls outside the Act's protections rests on the party seeking to exclude those workers—XPO in this case—and the Board narrowly interprets the

independent contractor exclusion to ensure that it is not used to exclude individuals who the Act was designed to protect. *SuperShuttle*, 367 NLRB No. 75; *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996); *Sisters Camelot*, 363 NLRB 162, 163 (2015); *BKN, Inc.*, 333 NLRB 143, 144 (2001). To make that employee status determination, the Board examines the totality of the circumstances using a non-exhaustive, multi-factor, common-law test. *See NLRB v. United Ins. Co.*, 390 U.S. 254, 256-259 (1968); *Roadway Package Sys., Inc.*, 326 NLRB 842, 850 (1998). These non-exhaustive factors include:

> 1. the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> 2. whether or not the one employed is engaged in a distinct occupation or business;
>
> 3. the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> 4. the skill required in the particular occupation;
>
> 5. whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> 6. the length of time for which the person is employed;
>
> 7. the method of payment, whether by the time or by the job;
>
> 8. whether or not the work is a part of the regular business of the employer;
>
> 9. whether or not the parties believe they are creating the relation of master and servant; and
>
> 10. whether the principal is or is not in the business.

Restatement (Second) of Agency, Section 220 (1958).

Binding Supreme Court precedent dictates that under the common law test "there is no shorthand formula or magic phrase" establishing employee status. *United Ins. Co.*, 390 U.S. at 258; *see also Pathmark Stores, Inc.*, 342 NLRB 378, 382 fn. 1 (2004) (noting that the Board

must apply Board precedent that the United States Supreme Court has not reversed). Instead, "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles." *United Ins. Co.*, 390 U.S. at 258. As part of this test, the Board has long considered the "potential for entrepreneurial profit" on the part of the putative contractor. *SuperShuttle.,* 367 NLRB No. 75, slip op. at 10; *Roadway,* 326 NLRB 842. For several years, under *FedEx Home Delivery*, this question of entrepreneurial opportunity was analyzed as part of a newly articulated factor focusing on whether an individual was actually operating as an independent business. In its 2019 *SuperShuttle* decision, however, the Board overruled *FedEx* "to the extent the FedEx decision revised or altered the Board's independent contractor test," returning its analysis to "the traditional common-law test that the Board applied prior to FedEx." *SuperShuttle*, 367 NLRB No. 75, slip op. at 1.

This reformulation, therefore, presented only a subtle shift from *FedEx* because the Board must still consider "all the common-law factors in the total factual circumstances of a particular case and [it must treat] no one factor or the principle of entrepreneurial opportunity as decisive." *Intermodal Bridge Transp.*, 369 NLRB No. 37, slip op. at 2 (2020) (citing *SuperShuttle,* 367 NLRB No. 75, slip op. at 11). In other words, *SuperShuttle* eliminated the separate factor which encompassed entrepreneurial opportunity, instead finding that entrepreneurial opportunity, "like employer control, is a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain." *Id.* The majority in SuperShuttle noted that "we do not hold that the Board must mechanically apply the entrepreneurial opportunity principle to each common-law factor in every case" but instead, "the

Board may evaluate the common-law factors through the prism of entrepreneurial opportunity when the specific factual circumstances of the case make such an evaluation appropriate." *Id.*

Moreover, another key part of the analysis that remained largely unchanged is the fact that the question of entrepreneurial opportunity is not considered in isolation, but in the context of any direct or indirect limitations and restrictions on the ability to exercise such opportunity—after all, pre-*FedEx* cases also weighed alleged entrepreneurial opportunity against the total factual circumstances which might interfere with the exercise of such opportunity. *See e.g. Roadway Package Sys.*, 288 NLRB 196, 198 (1988) (rejecting the Regional Director's finding that "efficiency of operation and ability to minimize costs" constitutes entrepreneurial opportunity because "the Employer establishes and regulates most matters essential to the drivers' livelihood . . . [controlling] the number of packages and stops, assignment of service areas, cost of service, and compensation."); *Corporate Express Delivery Sys.*, 332 NLRB 1522, 1522 (2000), enfd. 292 F.3d 777 (D.C. Cir. 2002) (finding that no opportunity for entrepreneurial gain or loss existed where employer determined routes, base pay and amount of freight for each route and did not allow drivers to add or reject customers); *Slay Transp. Co.*, 331 NLRB 1292, 1294 (2000) (finding that no entrepreneurial opportunity existed where the employer controlled drivers rates of compensation and prices charged to customers). Thus, even under *SuperShuttle*, any claimed theoretical opportunity cannot be divorced from the question of whether that opportunity is actually realized or whether the opportunity remains merely theoretical because of direct or indirect restrictions.

Along those same lines, at no point has the Board allowed the *realities* of a working relationship to be overshadowed by esoteric framing of the issue, by superficial and one-sided written agreements, or by nefarious maneuvering by employers. Instead, the Board must look

beyond written agreements and focus its analysis on the facts of each particular case. As the Supreme Court eloquently phrased it, "[w]hat is important is that the total *factual context* is assessed in light of the pertinent common-law agency principles." *United Ins. Co.*, 390 U.S. at 258; *see also N. Am. Van Lines v. NLRB*, 869 F.2d 596, 599 (D.C. Cir. 1989) (observing that distinction between "employees" and "independent contractors" is "permeated at the fringes by conclusions drawn from the factual setting of the particular industrial dispute."); *Roadway*, 326 NLRB at 850 ("Not only is no one factor decisive, but the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors. And though the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual background leads to an analysis that makes that factor more meaningful in one case than in the other."). In other words, it is the *reality* of the relationship in light of all attendant facts that matters.

Thus, whether the Region applies the employee status test as formulated in *SuperShuttle* or whether the Board eventually rectifies its mistake and makes clear that *SuperShuttle* was incorrect to the extent it made entrepreneurial opportunity a prism or magic phrase in the common law analysis, the same conclusion will follow—XPO's drivers are statutory employees entitled to a union election.

1. Employee Status Analysis Must Take Into Account the Context of XPO's Operations and the Realities of the Trucking Industry

As described above, the very nature of XPO's intermodal operations requires XPO to move thousands of its customers' containers across the country utilizing and coordinating between trucks, ships, and trains so that XPO can ensure that it is meeting the timeliness and affordability commitments it has made to its customers. XPO's intermodal business thus relies on the consistent and predictable work done by the drivers in the petitioned-for unit, who have to

move containers and make deliveries within XPO's timeframes to ensure that XPO's complex operations will run smoothly. This business model is not only antithetical to the type of local autonomy XPO invents to challenge the appropriateness of the unit, it is also antithetical to the type of actual autonomy XPO would have to provide drivers if those drivers were actually independent contractors. To that end, in structuring its operations, XPO made a choice not to merely function as a broker who contracted with truly independent motor carriers. Commerce Terminal Manager Jeff Freeman admitted that he has the ability to send 100% of the Commerce work to outside carriers, but "there is no practical reason for that." Tr. 414:13-415:3. Instead, XPO chose to itself operate as the motor carrier doing this trucking work, giving it an ingrained level of control over the petitioned-for drivers who now have to operate under XPO's operating authority.[12] That is why XPO's own witnesses referred to these drivers as part of XPO's "fleet," which is exactly how one would describe an employee driver workforce who does work at the core of XPO's operations, and which can be contrasted with the "core carriers" that XPO clearly sees as separate and distinct from its own operations, and which it only utilizes when it cannot cover all of its work with unit drivers.

In its arguments during the instant hearing and in every other proceeding where drivers' employee status has been asserted, XPO attempts to bypass this holistic, function-focused analysis in favor of a rote formulation of employment that ignores the reality of modern-day employment arrangement and the realities of the industry in question. By XPO's calculation, the only way its drivers could be employees is if XPO paid those drivers by the hour, if XPO set mandatory start and end times for each driver, if XPO strictly controlled when these drivers

[12] *See* Federal Motor Carrier Safety Administration regulations for Motor Carriers https://www.fmcsa.dot.gov/regulations/title49/b/5/3, in contrast to regulations applicable to brokers https://www.ecfr.gov/current/title-49/subtitle-B/chapter-III/subchapter-B/part-371

worked and when they could take time off, if XPO never allowed drivers to express any preferences or never gave them any choices in the work they were assigned, and if XPO actually called its punitive actions against drivers "suspension" and "termination" instead of referring to them as placing a driver "out of service," putting a driver on "dispatch hold," or "disqualifying a driver."[13] The Board, however, has rejected such a narrow formulation of its test and has made clear that each case is different and must be analyzed in light of its individual context.

2. XPO Controls Significant Aspects of the Working Relationship With Its Drivers

In *SuperShuttle*, the Board explained that "employer control and entrepreneurial opportunity are opposite sides of the same coin: in general, the more control, the less scope for entrepreneurial initiative." *SuperShuttle*, 367 NLRB No. 75, slip op. at 9. With that framing in mind, Judge Dibble found that this factor supports a finding of employee status because XPO exercises "significant control over drivers' work," which consequently means that drivers do not have a significant level of entrepreneurial opportunity. ALJD II at 7. In reaching this conclusion, Judge Dibble found that in most instances, the control which XPO attempted to attribute to drivers is illusory. *Id.* Thus, despite the fact that Judge Dibble found that drivers have control over their work assignments and schedules, could work for other companies, could accept or reject loads, could choose their shifts and breaks, could choose their delivery routes, and controlled maintenance on the vehicles, this control was insufficient to make the drivers independent contractors. This is because these alleged freedoms are overshadowed by the

[13] Such flowery language is not sufficient to mask the true nature of XPO's punitive actions. *See Extendicare Homes, Inc*, 348 NLRB 1062, 1064 (2006) (citing *Progressive Transp. Services*, 340 NLRB 1044, 1048 (2003)) (actions taken by employers constitute discipline if the action "has the real potential to lead to an impact on employment."); *Battle Creek Health Sys.*, 341 NLRB 882, 898 (2004) ("In today's work environment, the absence of formal sanction is not completely dispositive. As illustrated by the [employer] in this case, employers display a fondness for euphemisms designed to sugarcoat a sometimes bitter pill.").

extensive control that XPO itself exercises, from determining the pickup and delivery locations and appointments based on customer needs, to controlling all aspects of interactions with clients, controlling drivers' compensation, controlling the type of insurance required, and propagating standardized contracts for its drivers. *Id.* at 7-8. None of the evidence introduced by XPO in the instant hearing upsets Judge Dibble's analysis.

XPO's will likely resort to arguing that Judge Dibble's decision only involved the Commerce facility and focused primarily on truck owners instead of second-seat drivers, and that the differences between Commerce and San Diego, and between truck owners and second-seat drivers, means that there must be a separate analysis. This argument fails for two reasons. First, as described in Section III.A., all of the petitioned-for drivers in Commerce and San Diego are subject to extensive centralized control, most of the applicable policies originate at the corporate level and are applicable to both facilities, and drivers at both locations do the exact same type of work as part of XPO's intermodal operations. Second, both truck owners and second-seat drivers also do the exact same work, play the exact same role in XPO's intermodal operations, and are subject to the same centralized rules and policies set by XPO. Tr. 1372:3-11 (Fernando Ramirez explaining that his work remained the same when he transitioned from being a second seat driver to a truck owner); Tr. 1207:10-15 (Ruben Aldrete, same); Tr. 954:6-955:9 (Domingo Avalos, same).[14] The only actual differences between these two groups of drivers is that truck owners own a vehicle and receive payment directly from XPO while second-seat drivers do not own vehicles and have their pay funneled through the truck owners. These differences are not

[14] Similarly, it is also worth noting that various drivers also testified that the substance of the work they were doing did not change when XPO took over operations from Pacer in approximately 2015, giving credence to the argument that even older policies are relevant to the employee status analysis in this particular case. Tr. 9:35:5-18 (Avalos); Tr. 1459:9-18 (Dominguez).

sufficient to tip the employee status analysis when all other aspects of the working relationship are identical, particularly considering the level of control XPO exercises over both groups (and the concomitant lack of entrepreneurial opportunity).

Thus, the same employee status analysis will apply to all drivers in the petitioned-for unit, and what the evidence demonstrates is that for both the Commerce and San Diego facilities, XPO continues to exercise unilateral control over the key aspects of the working relationship, directly limiting drivers' entrepreneurial opportunity. And even in the areas where drivers do have some freedom, any entrepreneurial significance tied to those freedoms are illusory because of choices XPO made regarding how to structure its business, and because of limits XPO places on drivers—both directly and indirectly.

(a) XPO Cannot Use Government Regulations to Mask the Extensive Control It Exercises Over Drivers

As it has done before unsuccessfully, XPO is likely going to argue that much of the control it exercises—and which benefits XPO by ensuring that it has a consistent workforce and that it can continue to be an attractive option for its customers—should not be considered in the employee status analysis because it is control that arises from governmental regulations and from XPO's efforts to comply with those regulations. This argument fails, however, because the common-law control factor is concerned with whether the employer exercises or retains the right to exercise control over the work—the reason for that exercise of control is irrelevant. If an individual is fully under the control of an employer, whether that control is required by governmental regulations or whether that control is required by the employer's commitments to its customers, there is no way that individual can be considered "independent." Even if this were not the case, however, and there were instances where the source or motivation for the exercise

of control was relevant, XPO's exercise of control must be treated as an indicia of employee status in this case for two reasons.

First, as will be demonstrated below, XPO's rules and regulations often go beyond what is required under federal law. *See Stamford Taxi*, 332 NLRB 1372, 1385 (2000) (control beyond regulations indicates employee status). Second, and perhaps even more importantly, any control exercised by XPO should be attributable to XPO because XPO made a conscious decision to operate in this industry, and to operate in this industry in a manner that gave it maximum control over the drivers doing the work at the core of its business. In particular, XPO could have chosen to merely operate as a broker that connected cargo owners with rail provides and with *independent trucking motor carriers*. Tr. 414:13-415:3 (Freeman) Although XPO would have still been subject to federal regulations as a broker, XPO would not have been able to exercise anywhere near the level of control over those motor carriers and their drivers as it does now over its own drivers who are forced to operate under XPO's operating authority. The only logical inference is that XPO chose to operate as the motor carrier itself rather than solely contracting with existing motor carriers because it saw some benefit in doing so and in having drivers be a part of its fleet instead of another motor carrier's fleet (even if that other motor carrier is an individual truck owner/driver). This means that not only can XPO now exercise more direct control over the cargo in question—which is no doubt an advantage to XPO's customers—it can now also exercise control over the drivers in question while attempting to minimize the significance of that control by pointing to governmental regulations.

XPO cannot be allowed to game the system in this way. It is irrelevant that government regulations require XPO to take certain actions because XPO made a *choice* to operate in this highly regulated industry in the exact manner that gave it the most direct control over its drivers,

and it must be held to account for this choice. Further, the Region should also give heavy weight to the question of whether taking such action ultimately serves XPO's business and its business goals. For example, XPO could have easily avoided having to track the condition of the vehicles moving its customers cargo if it had just decided to contract with motor carriers for those moves as a broker[15]. Instead, by deciding to operate as the motor carrier itself, XPO can now benefit from having drivers submit daily inspection reports directly to XPO. This means that XPO can ensure that the vehicles moving its containers are actually maintained in good condition, which in turn serves XPO's business purpose by ensuring that the vehicles it needs will be available when it needs them and by minimizing the likelihood that a container will be abandoned mid-delivery because of mechanical issues. Thus, because of its own business choices in service of its own enterprise and its customer's needs, to operate as a motor carrier, XPO's exercise of control must be attributed to XPO even if ostensibly required by federal regulations.

(b) XPO's Unilaterally Drafted Independent Contractor Agreement Should Be Given Little Weight

Perhaps the first indicia of XPO's overall level of control over drivers is that XPO unilaterally drafted the agreement it required drivers to sign in order to work. Tr. 953:21-954:5 (Driver Avalos, "Besides that, if we didn't agree with the terms of the contract, simply we didn't have the truck and no work."); EX 13. As Judge Dibble put it, XPO "unilaterally drew up the terms governing the parties' working relationship." ALJD II at 20. In fact, this agreement is not even drafted at the terminal level where drivers apply—it is centrally drafted at XPO's corporate office and the same contract, referred to as the Independent Contractor Operating Contract ("ICOC") is provided to each terminal. Tr. 379:21-25 (Freeman).

[15] *See* 49 CFR Part 371, Brokerage of Property.

Drivers testified they did not read the agreement or have it explained to them, Tr. 1108:9-1109:1 (Alvarez), Tr. 1301:8-25 (Vasquez); they did not receive the contract in their native language, Tr. 1200:6-22 (Aldrete); and they did not negotiate any terms in the agreement, Tr. 1446:6-11 (Yebio). Even second seat-drivers, although they are not required to sign the entire ICOC, are required to sign Schedule K in order to work. Tr. 281:23-282:5, 285:10-13 (Freeman); Tr. 621:4-11 (Limuaco); EX 13 at 262. XPO's own witnesses admit that there is no Spanish version of the ICOC, which is particularly troubling considering that the majority of driver witnesses had to testify in Spanish in this case. Tr. 283:7-11 (Freeman). To that end, it is not surprising that there is no evidence that any driver has made revisions to the ICOC or has had an attorney review it or brought back comments abouts its contents. Tr. 283:12-19.

Thus, to the extent that the ICOC supports XPO's claim that drivers are independent contractors, the Region should give it little weight as a self-serving document drafted and unilaterally imposed by XPO, and the Region should ignore the terms of the ICOC in favor of evidence showing what the *reality* of the working relationship is between XPO and its drivers.

(c) Drivers' Alleged Freedom with Regards to Work Schedules and Assignments Is Illusory And Does Not Support Independent Contractor Status

Based on the evidence and testimony from XPO's witnesses, it is clear that XPO intends to rely on the exact same arguments regarding control and entrepreneurial opportunity as it did in the two hearings before Judge Dibble.

For example, XPO appears to be placing heavy weight on the fact that the new dispatch applications they began using when the pandemic began "allow[] some additional flexibility" and has made it so that there is less direct contact between drivers and dispatchers. Tr. 40:8-13 (Tibbetts); Tr. 264:19-265:5 (Freeman); Tr. 556:13-557:6 (Limuaco); EX 5 (corporate-level training document for dispatchers illustrating how to choose which particular assignment to send

to a specific driver using the Intermodal Fleet application). In short, XPO has "digitized" portions of its dispatch process that in the past might have involved going into the office or calling a dispatcher directly. Tr. 41:5-12 (Tibbetts); Tr. 116:13-23 (Darling). XPO claims that this increases drivers' "personal choice" because it allows them to more easily reject assignments. Tr. 116:13-23; 39:11-25 (Tibbetts). XPO's witnesses also dedicated much of their time to explaining that dispatchers "just develop familiarity with the owners who like to make certain runs" and that drivers can make their preferences known to the dispatchers.[16] Tr. 221:15-24, 224:11-24, 250:13-20, 260:9-19 (Freeman); Tr. 558:12-24, 572:20-24 (Limuaco). Similarly, XPO argues that drivers "have the freedom to do one run . . . [or] to run for 14-hours, and do seven or eight runs." Tr. 238:16-20. In other words, drivers have the freedom to decide to work or not to work and to take a load or not on any given day. Tr. 254:18-23, 258:6-7 (Freeman); Tr. 559:19-23 (Limuaco); Tr. 783:23-784:10 (Driver West); Tr. 834:15-25 (Driver Moore). According to XPO, drivers can even decide to take weeks off at a time if they would like, without consequence. Tr. 618:22-24 (Limuaco). XPO also emphasizes the fact that it does not assign drivers specific shifts. Tr. 256:10-24 (Freeman).

Judge Dibble, however, already considered every single one of these facts in her analysis and nonetheless found that the control factor supported a finding of employee status. Specifically, Judge Dibble acknowledged that "dispatchers work to learn the drivers' preferences for: start and stop times, days they want to work, routes they prefer, and length of their workday because these factors help the dispatchers determine how to assign loads for delivery." ALJD II at 4. Similarly, Judge Dibble found that "drivers have some control over their work assignments,

[16] Such familiarity it is worth noting, is something that can only develop in a consistent workforce providing regular and consistent services to the same entity—with an employee workforce in other words.

work schedules, and opportunity to work for other companies. . . . .[D]rivers . . . decide which loads to accept, the number of hours to work, which shift to work, when to take time off from work, when to take breaks, selection of the delivery route, and exclusive control over the trucks they drive which includes most maintenance and repair decisions." *Id.*at 8. In so finding, Judge Dibble rejected the argument that drivers are retaliated against for rejecting loads. *Id.* Despite this, Judge Dibble found that XPO's pervasive control over other aspects of the working relationship far outweighed any freedom or entrepreneurial opportunity that arose from the drivers' freedoms. As described below, XPO continues to exercise this pervasive level of control over other aspects of the working relationship, which means that this factor favors employee status even if—as Judge Dibble found—drivers do have control over these aspects of the relationship. It is worth noting, however, that even these alleged freedoms are more constrained than Judge Dibble acknowledged and there was strong evidence adduced during the instant hearing which would justify reversing the Judge's finding that XPO did not retaliate against drivers—particularly when the question of rejecting assignments is viewed in its proper context.

Specifically, by its very nature, containerized trucking work allows for employers to provide its drivers with some flexibility while still having a reliable workforce that it can count on to do its core work. This is because the containers that must be delivered are fungible—XPO does not care which specific driver moves which container, as long as the container gets moved when XPO needs it to be moved. Similarly, on the driver's end, because pay is commensurate with distance, there is often not much to differentiate one load from another—those that are slightly further will take slightly more time and will pay slightly more. This opens the door for XPO and its dispatchers to take into account individual preferences that do exist for drivers and to, when it will not affect XPO's overall schedules or bottom line, give drivers some choices

about what work they want to do. XPO can thus allow drivers to sometimes reject assignments because there is more likelihood than not that another driver will do that assignment. PX 291 (data on the total number of accepted and rejected assignments in 2021 for both the Commerce and San Diego terminals, reflecting a de minimis 2.2% of loads rejected). In the rare instances when that is not the case, the dispatchers can either provide a financial incentive—which employees are also often offered in other industries for things such as volunteering for overtime or receiving a pay differential for working an evening shift—or they can apply pressure on drivers and retaliate if drivers do not take the assignment.

This approach is the only logical one, considering that getting these loads covered is at the very core of XPO's business. As Jeff Freeman explained, it is the dispatchers' job to

> execute the plan. They make sure that they get the – the pickups and deliveries covered, which is no easy task. So we – dispatchers are working every day to plan ahead as much as possible to cover all of the required pickups for all of the different customers, all of the required deliveries.

Tr. 220:16-21. This means that "dispatchers spend almost all of their time working to get the loads covered . . . ." Tr. 221:4-6; s*ee also* PX 3 (XPO instructional document to dispatchers illustrating dispatchers' ability to "assign multiple work orders to a driver and rearrange their order to plan out a driver's day before dispatching").When this is placed in context with driver testimony during the hearing, it is clear that XPO does allow flexibility when it makes no difference to XPO completing its work, but that XPO is equally likely to strike with the iron fist when its business needs necessitate it. That is why it is not surprising that the record is devoid of convincing evidence that drivers make *entrepreneurial* decisions when rejecting assignments—instead, the bulk of the evidence regarding drivers' rejecting assignments has to do more with personal preferences, mechanical issues with the equipment to be moved, or drivers running out of service hours. Tr. 961:18-963:8 (Driver Avalos); Tr. 1470:14-1472:10 (Driver Dominguez).

As Driver Josue Alvarez explained, it is nearly impossible to make true entrepreneurial decisions when rejecting assignments "[b]ecause if I reject that one, I might get something similar pretty much. It's not -- it's not like -- because port is still the same as anywhere -- as anywhere you go. It's basically the same. And I don't usually reject them. Because I'm going to get some -- I'm pretty much, I'm going to get the same thing." Tr. 1124:5-12.

XPO's witnesses also explained how when there is an assignment that has been rejected but XPO needs it to be done,

> dispatch would first try and reach back out to see if they could negotiate a premium to make it more enticing for the driver. If that is not successful, dispatch will offer a higher premium. If that still does not work, they will move on and see if there is other work available that the owner-operator or second-seat driver will want to take it. Then they will move on to whoever does not have a dispatch or job offered yet to eventually find coverage for the load

Tr. 567:13-568:3 (Limuaco). Similarly, when facing a difficult load that some drivers might not want to do, "the dispatchers will look to package a difficult load with some easier drop-in deliveries where it will help the owner-operator . . . to make a little more money instead of being stuck on multiple live loads." Tr. 309:19-310:4 (Freeman). If these carrots are not sufficient to convince a driver and no one accepts the load, XPO will be forced to pay more money to a core carrier—a bona fide motor carrier with its own operating authority, separate and apart from the drivers in the petitioned-for unit—or it will be forced to go to its customer, break its commitment to the customer, and reschedule the load. Tr. 416:1-4 (Freeman); Tr. 567:13-568:3 (Limuaco). When faced with these options and with XPO's commitment to its customers, it is not a stretch to believe that XPO and its dispatchers might decide to utilize the stick to avoid having to disappoint the customer or pay more for a core carrier, even if instances of XPO having to get to this point are few and far between.

Drivers' testimony confirms that XPO does get to this point, and that XPO—contrary to what Judge Dibble found—*does* use the stick to retaliate against drivers when it is necessary. Ruben Aldrete, for example, explained that up until the pandemic began, dispatchers would retaliate by not giving him any work at all if he refused a load. Tr. 1220:12-22. Gerardo Dominguez also testified that there have been occasions when, after dropping off a container from San Diego to Los Angeles, he has refused a load in the Los Angeles area and he was then forced to return to San Diego without any work at all, which meant that he was not paid for that return. Tr. 1470:14-1472:10. Similarly, Juan Vasquez and Francisco Bañales testified that they have essentially been forced by dispatchers to take assignments when in the Los Angeles area, otherwise they would not be paid anything on the way back to San Diego, not even bobtail. Tr. 1304:21-1305:5; Tr. 1521:10-1522:5.[17] When viewed in this context, even these maybe infrequent examples of retaliation must be given heavy weight, and the Region should find that drivers *are not* free to reject assignments without consequence.[18]

[17] Driver Vasquez explained that in practice, when a driver refuses a load dispatch tells them that they cannot pay the driver bobtail "because they are offering you another load and you not want to accept it." Tr. 1304:21-23. . In his experience, when he is assigned a load he does not want to do, he either has to return bobtail without getting paid or will have to accept their loads so that he can get paid, but in his opinion XPO is "forcing" drivers to accept the load. Tr. 1305: 1-5. This was a stark contrast to what Vasquez was promised when he first onboarded and XPO explained to him that if he was in the Los Angeles area and refused a load, he would nonetheless be paid bobtail on his trip back to San Diego—this changed recently, likely when XPO realized it needed to force drivers to take these loads and it decided to do so by punishing drivers and taking away their bobtail payment for refusing to take a load. Tr. 1304:15-1305:5.

[18] This conclusion is much more reasonable than the fantastical claims made by Jeff Freeman, which is that even once drivers have accepted a load, they can essentially decide to just not show up and abandon the load, without consequence. Tr. 503:6-504:19. And even Freeman appeared to admit as much, because when pressed on the issue he admitted that he has never had a driver do that without providing a good reason such as a mechanical breakdown, a family emergency, or sickness. *Id.*

Along those same lines, drivers do not exercise any actual freedom or entrepreneurial opportunity by being able to choose when to work or by taking time off whenever they want. The Board has clearly and consistently held that the ability to make more money *by working more hour or working faster* does not equate to entrepreneurial opportunity because any employee can make more money in that manner. *Intermodal Bridge Transp.*, 369 NLRB No. 37, slip op. at 15 ("[T]he only opportunity the drivers had to increase their compensation was to work more hours, [which] does not turn an employee into an independent contractor, since it does not mean that they enjoy an opportunity for entrepreneurial gain."); *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1765 (2011) ("[T]o work more hours or faster does not turn an employee into an independent contractor."); *see also Standard Oil*, 230 NLRB at 972 (1977) ("[U]nlike the genuinely independent businessman, the drivers' earnings do not depend largely on their ability to exercise good business judgment, to follow sound management practices or to be able to take financial risks in order to increase profits."). This is particularly true when XPO exercises indirect control over those working hours by establishing a piece rate compensation system which incentivizes XPO to and gives XPO the ability to control drivers by controlling the timing and manner it offers loads in order to increase its own profits by having the drivers complete more work.[19]

This situation is analogous to *Intermodal Bridge Transport,* another recent drayage trucking case, where drivers' ability to choose what days to work and what time to start, and their ability to choose between several different assignments when they do show up to work, was

[19] After all, "[w]hen an employer does not share in a driver's profits from fares, the employer lacks motivation to control or direct the manner and means of the driver's work." *Supershuttle,* 367 NLRB No. 75, slip op. at 60 (citing *Metro. Taxicab Bd. of Trade,* 342 NLRB 1300, 1309–10 (2004).

negated by the fact that dispatchers controlled the assignments offered to drivers and controlled drivers' interactions with customers. 369 NLRB No. 37, slip. op at 3. After all, there is no evidence that drivers have open and ready access to the dispatching system to peruse all available loads at any time they please, and in fact dispatchers "choose what work in particular to send to each specific driver." Tr. 156:2-3 (Darling); EX 3 (job aid instructing dispatchers on how to assign and unassign work orders, which drivers themselves cannot see in the dispatch system until the assignment is dispatched). And once again, this is logical considering the timing dependent nature of XPO's operation, which is why dispatchers actively monitor assignments that they have sent to drivers to make sure that drivers start the assignment in a timely manner because, as Freeman put it, those drivers "should be executing those moves" when they are sent and if not "there's danger that [XPO] might not be able to cover those loads." Tr. 253:18-254:5. Thus, as drivers testified, once a dispatcher sends them a load the drivers *must* start the load within two hours or that work will be taken away from them. Tr. 1317:23-1318:16 (Vasquez); Tr. 1375:23-1376:70 (Ramirez); Tr. 1520:10-1521:4 (Bañales).

On top of that, XPO places other constraints on drivers' ability to actually and truly control when they will work. Although XPO claims that drivers can take weeks off work without consequence, XPO also has established a rule that it will terminate any driver who does not complete at least one load for XPO every 35 days. Tr. 301:19-23 (Freeman); Tr. 1508:14-25 (Dominguez explaining that his "understanding is if you don't present yourself to work with whatever reason it would be, whether it would be because of an illness, medical reasons, personal reasons, whatever the reasoning is, if you don't physically present yourself to be able to work within the 30 days, you are fired," whether you were physically able to work or not.); PX 36 (email thread between XPO corporate safety and Commerce field safety specialist Wayne

Stevenson informing Stevenson that a driver had not been dispatched for 34 days and encouraging him to dispatch the driver prior to the 35-day cutoff). And XPO even monitors drivers weekly to see who has been accepting loads. Tr. 469:16-20; EX 14 and 15 (reflecting that XPO keeps track of drivers' most recent dispatch date at both the Commerce and San Diego facilities).

Moreover, by making its assignments first-come, first-serve, XPO pushes drivers to be more "proactive" by planning ahead and giving XPO advanced notice of when they expect to work—otherwise, those drivers are "not as successful." Tr. 223:16-224:7 (Freeman). For San Diego, this advanced notice process is even more formal:

> Every Friday, [XPO] sends a text ask out to all of the owner-operators and second-seat drivers to ask them what time they want to work the following week. And then they either – they either respond or they don't. And if they don't respond, it's up to them whether or not they want to come in to the terminal or – or call us to ask what's available for the day.

Tr. 556:13-557:6; 564:23-565:20 (Limuaco). PX 233 (text from XPO dispatch to Driver Aldrete, informing him that pre-plan hours are between 7 AM to 10 PM and asking him to respond with his driver number, the days he would like to work, and the time he would like to start). As multiple drivers testified, a failure to give advanced notice will likely mean that the driver will have to wait an extended period of time when they try to get work the following week, or that they might not get any work at all. Tr. 1219:3-12 (Aldrete); Tr. 1315:12-1316:24 (Vasquez); Tr. 1372:12-1374:8 (Ramirez). Thus, XPO directly and indirectly requires drivers to work consistently and to give advanced notice of their availability so that XPO can do what every other employer across the country does with its workforce—plan out its work to ensure everything that needs to get done will get done.

For these reasons, the illusory freedoms that XPO relies on in its argument do not make these drivers independent contractors. It just makes them employees who, like any other

employees, do what they can to try to make more money—either by doing more assignments quicker if they are getting paid piece meal, or by working more hours if they are getting paid hourly. But they are not doing so in service of their own enterprise; they are doing it in service of XPO's core business in order to merely make a living. While there are differences in total compensation between drivers, XPO has introduced no evidence that these differences are attributable to an actual exercise of managerial skill as opposed to it merely being a function of how much or how quickly a driver works.[20] When coupled with the further control exercised by XPO, described below, there is no doubt that the control factor continues to strongly support a finding of employee status.

(d) XPO Sets Driver Qualifications Stricter Than Federal Regulations Require and Onboards Drivers As If They Were Employees

As XPO freely admits, it does not just contract with any driver who is qualified to be a commercial driver under federal law—its requirements "are at least as restrictive if not more restrictive than the government." Tr. 535:3-7 (Freeman). For example, XPO exceeds both the state and federal requirements in terms of interstate drivers' minimum age. Tr. 536:10-13 (Freeman); PX 19-21. Similarly, XPO requires that driver have a certain level of driving experience that is not required under federal law. Tr. 394:1-4 (Freeman); PX 19-21. XPO

[20] Moreover, XPO's reliance on gross compensation as listed on 1099 forms to truck owners is similarly unpersuasive. Although XPO points to gross compensation amounts that vary widely, XPO has made no showing that these amounts are in any way correlated to anything other than the amount of work done by drivers. If a truck owner has three trucks and there is one XPO driver utilizing each truck and they each do 5 moves in a week, that truck owner will receive a settlement statement reflecting fifteen moves, which will appear three times larger than an owner who has a single truck and did 5 moves that week themselves. But this is not a reflection of entrepreneurial opportunity—once the expenses XPO forces on drivers are taken into account and the pay is split up among the many drivers that did the work in question, it is clear that these amounts correlate only to the amount of work that was done at the compensation rates set by XPO. Thus, the different in gross compensation to truck owners does not reflect any actual exercise of entrepreneurial opportunity. *See* EX 137.

qualification requirements for drivers also include certain limits on preventable accidents and moving violations, even when drivers with such violations could still drive for other companies. Tr. 304:7-305:1 (Freeman); PX 19-21 (qualification guidelines showing XPO's policy of disqualifying drivers for more than one preventable accident within three years, more than three moving violations in the past three years, or exceeding the speed limit by 15 miles per hour or more). These requirements come from the corporate level, and apply to both tuck owners and second-seat drivers. Tr. 1203:21-25 (Aldrete). These types of very specific hiring requirements are much more reminiscent of an employer seeking out an employee for a long term relationship than a business entity seeking out a true independent contractor for work that falls outside of the entities core business. After all, if the only thing XPO was looking for is a truly independent operator, the only thing that should really matter to XPO is whether that operator is actually qualified to operate under the law and the rate for which that independent operator would do the work. The rest of the on-boarding process also strongly resembles the application process for an employee as opposed to the process for a true independent contractor.

Both truck owners and second-seat drivers testified to essentially identical application and onboarding processes and stated that they had to apply directly with XPO—there is no evidence that any second seat driver filled out any sort of application with the owner whose truck they used. Tr. 1097:13-1098:3 (Alvarez); Tr. 1178:6-18 (Aldrete); Tr. 1296:15-1297:10 (Vasquez); Tr. 1358:22-1359:14 (Ramirez); PX 236 (Aldrete's job application to XPO from 2016; PX 263 (sample application from 2021)**.** Drivers testified that XPO required them to take a drug test at a clinic of XPO's choosing, at XPO's expense. *See e.g* Tr. 1298:3-1299:8; Tr. 1518:14-1519:7 (Bañales); Tr. 210:18-19. Moreover, XPO required that drivers get new physicals and medical cards—even if drivers already had valid medical cards that would not be

expiring for months. Tr. 1056:12-21 (Avalos); 1185:23-1186:12 (Aldrete); 1298:3-1299:8 (Vasquez); 1363:7-17 (Ramirez); 1464:2-1465:25 (Dominguez). Although XPO may attempt to hide behind a claim that it was required to do these tests under federal law, this argument is unpersuasive not only because XPO exceeds those requirements, but because XPO's choice to operate as a motor carrier brought these requirements into existence.

Once drivers did their drug test and physical, multiple employees testified that they were taken on road tests so that XPO could assess their ability to operate the truck—whether they first applied in 2014 or 2021. Tr. 943:24-944:6 (Avalos); Tr. 1097:13-1098:3; 1102:23-1103:3 (Alvarez). Many of the drivers on the stand also testified that they were required to do various training videos and tests before they were allowed to drive for XPO. Tr. 1099:4-20 (Alvarez); 1183:7-13 (Aldrete); Tr. 1299:9-25 (Vasquez); Tr. 1359:13-1361:5 (Ramirez); Tr. 1443:8-1444:9 (Yebio); Tr. 1463:12-1464:1 (West), 1466:17-1469:4 (Dominguez, two applications one in 2014 one in 2021); Tr. 785:18-20; 797:12-17; PX 249 (list of trainings covering topics such as HazMat general awareness, high-risk commodity, and an eight-part CSA driver series) Once again, this type of standardized application and training process is what an employer does when it is building up its employee complement—it is incompatible with a typical, individualized contracting process with actual independent contractors.

Finally, after drivers complete that training and testing, XPO takes it upon itself to communicate all of its rules and expectation to the drivers, such as explaining to them that they must wear their vest in the yard, that they could be terminated if they received a speeding ticket six miles over the limit, that they could be terminated if they have a cell-phone ticket; and about XPO's disciplinary points system. *See e.g.* Tr. 1100:8-1101:2 (Alvarez); Tr. 207:3-208:5 (Freeman); PX 264. XPO also hands out a Safety Matters handbook that drivers, including truck

owners and second-seat drivers, are required to comply with. Tr. 695 (Limuaco); Tr. 1190:4-13 (Aldrete); PX 13.This Safety Matters handbook instructs drivers on who to contact for operational issues, settlement issues, and safety issues (pg. 6); on how to use the ELD to record and submit logs (pg. 8-19); on reporting fuel and mileage with sample paperwork (pg. 21-24); on how to conduct and submit monthly inspections (pg. 25-27); on XPO's accident procedures accident reporting requirements (pg. 28-34); on container yard operations (pg. 35-36); on roadside inspections, including grounds for disqualification (pg. 37-38); and on XPO's disciplinary CSA point system (pg. 39-40). Along with that, drivers receive instructions on how to operate the tablet XPO provides and a booklet with hazmat instructions. Tr. 404:3-15 (Freeman). In fact, XPO even pays one of the drivers at the Commerce yard to help train all new drivers who are onboarded. Tr. 410:5-11 (Freeman).

There is no way to view this process as anything other than the onboarding of employee drivers, and this entire process should weigh in favor of finding employee status.

(e) XPO Sets Work Rules Which Are Enforced Through A Disciplinary System Established by XPO

In her decision, Judge Dibble properly held that "instances of discipline, even if occasionally, the Respondent metes out to the drivers indicate [the] significant control it has over them." ALJD II at 14 (citing *Sisters Camelot*, 363 NLRB at 163; *Dial-A-Mattress Operating Corp.*, 326 NLRB 884, 892–893 (1998)). Thus, Judge Dibble found it significant that drivers were provided "counseling" about "performance issues beyond what is required by governmental regulations," that XPO had set up a 75-point CSA threshold upon which it will terminate drivers, and that XPO would terminate drivers for repeated log violations. ALDJ II at 13. Now, there is even stronger evidence of the disciplinary measures that XPO takes to enforce its policies—policies which often go beyond anything required by federal law.

To begin, although XPO is attempting to use different framing, it is clear that they still do some level of counseling if drivers are not in compliance with certain policies. With regards to the CSA score, for example, Freeman explained that they will "notify" drivers when they are getting close to the points threshold, so that the driver can be "diligent" in their inspections to avoid going over the point threshold and being terminated. Tr. 266:9-12. XPO wants that driver to be on notice that they need to be "extra vigilant." Tr. 478:7-10. Specifically, "the safety specialist will work with any owner-operators to – that might have issues. If they notice that there's an hours of service violation – something that will put us in a negative standing, they'll work with us and the (audio interference) and maybe put the owner-operator on notice." Tr. 209:8-18. This sounds like counseling by any other name. PX 35 (September 2018 safety action plan email directing terminals to "bring contractors to the safety department" if they have HOS violations, have a discussion and provide "additional training," inform driver that subsequent violations can result in cancellation of contract, and putting drivers out of service if they do not show up within 72 hours of being requested to do so).

More to the point, however, XPO admits that the 75 point CSA threshold is "a number that XPO established" and XPO is the one that made the decision that it was in its own business interest to set this points threshold and to terminate drivers who exceeded that threshold—there is nothing in the federal regulations or the CSA program which required that drivers be terminated at this level.. Tr. 479:20-24; 1555:18-1557:13 (Freeman);s*ee also* PX 264 (CSA compliance policy illustrating that reaching the 75-point threshold will lead to disqualification and the inability to reapply for 365 days). The only effect of a high CSA score for a carrier like XPO is that customers might choose not to use that carrier and insurance rates may rise, a problem XPO could have avoided if it contracted with independent carriers itself. Tr. 473:16-24

(Freeman). Both first seat and second-seat drivers universally testified that they are aware of this system and understand it to apply to them, and that they will no longer be able to continue driving for XPO if they exceed this point threshold. Tr. 978:12-979:48:25-149:8 (Avalos); Tr. 1141:4-23 (Alvarez); Tr. 1239:14-1240:12) (Aldrete); Tr. 1324:16-1325:3 (Vasquez); Tr. 1380:3-18 (Ramirez); Tr. 1419:18-1421:7 (Samayoa); Tr. 1475:5-15 (Domínguez); Tr. 1524:25-1525:10 (Bañales).

Aside from the CSA disciplinary system, XPO also admitted that it has established other performance metrics and rules for drivers, and that it will take pecuniary action against drivers for violating those rules. XPO for example, may terminate drivers for DUIs, for speeding violations, for other moving violations, for reckless driving, and for having two preventable accidents within three years, even if those drivers would still be qualified to drive under federal law. Tr. 537:3-21, 395:9-396:18; 397:15-398:4, 400:4-9 (Freeman); PX 19-21. For drivers who commit a felony, XPO will prevent them from working for five years, whereas under federal law they would only be disqualified for one year. Tr. 537:22-538:5. If a driver leaves the scene of an accident, XPO will disqualify them for three years whereas under federal law they would only be disqualified for one year. Tr. 538:12-15. In fact, XPO makes it very clear to drivers that they are required to comply with XPO's rules, not just with federal regulations—it instructors drivers that "DOT/FMCSA regulations provide for only the minimum in safety—always comply with XPO's safety standards that exceed regulatory compliance." PX 256-258 (daily safety messages from 2016-2018 titled "Does Your 'Safety Attitude' Need a Tune-Up?"). Within the past year, XPO terminated a driver for switching from one of his trucks to a different one without informing XPO, Tr. 955:6-956:4 (Avalos).

Drivers also generally testified that they are aware of all of these policies and that in many instances they have actually seen coworkers terminated for such reasons. Tr. 979:5-10 (Avalos); Tr. 1240:13-1241:7 (Aldrete); Tr. 1382:4-1383:4. (Ramirez); Tr. 1421:8-14 (Samayoa); Tr. 1475:17-1476:10 (Dominguez). XPO also sets insurance requirements for its drivers, which drivers either have to accept from XPO or obtain themselves. Tr. 297:18-21; PX 42 (email thread between regional driver recruiter and Commerce field safety specialist Roland Hoeppner stating that a driver's insurance did not meet XPO's requirements because he did not have bobtail liability). A list of contract terminations produced by XPO shows that two drivers have been recently terminated for "Company Policy" issues related to insurance. PX 284, 285. Additionally, along with showing terminations for many of the other reasons listed in this paragraph, the documents produced by XPO also shows that at least one driver was terminated for "driving for another company and XPO." PX 285. This lends credence to testimony by drivers that they were explicitly told by XPO representatives that they cannot work for other companies. Mr. Yabio, for example, testified that in 2018 when he began working for XPO he asked XPO if he could drive for other companies and they told him that he could not, that it was their policy that he could not drive for another company and that he could not give his truck to anyone else to drive it. Tr. 1445:9-11:5; s*ee also* Tr. 949:20-25:1 (Avalos, "Mr. Chevez told me that . . . we could not carry any -- any packages or anything from another company that won't be XPO.").

Finally, in additional to those terminable offenses, XPO has established various rules which it enforces by taking drivers out of service, or putting them on dispatch hold, when they fail to comply. For example, drivers must submit daily logs to XPO and a failure to do so for even one day can lead to drivers being put on hold—although Freeman attempted to deny that

this is the case, text messages sent by XPO to drivers and driver testimony makes clear XPO's actual policy. Tr. 497:6-8 (Freeman); PX 89-91 (text received by Avalos in June 2020, July 2020, and September 2020 asking him to certify and submit logs before midnight the same day to avoid dispatch hold the next day); PX 217-218 (texts received by Alvarez informing him that he was being put on dispatch hold for missing logs; PX 219-220 (texts received by Alvarez informing him that blocks would be put out that day for missing logs); Tr. 1131:23-1132:12 (Alvarez). This requirement to submit logs applies *even on days when drivers do not work*, such as when they are on vacation or when there was a slow-down at the start of the pandemic. For example, Mr. Bañales has been contacted on his off time so that he can submit those logs. Tr. 1525:17-1526:8. Mr. Alvarez testified that when he goes on vacation he is always out of service when he comes back because he did not turn in his logs while he was not working. Tr. 1132: 15-22. Mr. Aldrete received text messages from dispatch telling him to certify his logs or he would be taken out of service, although he was away from San Diego at the time and did not have access to his tablet. Tr. 1230:10-1231:2. XPO has also decided that drivers can only use paper logs for 8 days in a 30 day rolling period, which is not a federal requirement. Tr. 496:21-24 (Freeman).

XPO also requires drivers to submit 90-day inspections, which XPO requires to be done at a mechanic of its choosing, either at the San Diego yard or close to the Commerce yard. Tr. 991:24-993:14 (Avalos); Tr. 1246:24-1248:4 (Aldrete). Drivers also have to submit a monthly maintenance report which includes a record and receipts of any maintenance or repairs done over the previous month. . Tr. 1245:2-1246:3 (Aldrete); Tr. 1326:25-1327:24 (Vasquez); PX 235 (Aldrete's monthly maintenance report from August 2018). And a failure to do either of those will result in drivers being placed out of service. Tr. 1131:5-15 (Alvarez); Tr. 1325:4-1326:4

(Vasquez); Tr. 1477:1-1478:10 (Dominguez). In fact, these inspections are moving targets based on XPO's needs—up until a few months ago, drivers could turn them in up until the 7th and now drivers have to turn them in by the first to avoid a dispatch hold. Tr. 1383:4-1385:13 (Ramirez). Mr. Vasquez was also placed on dispatch hold for a full 24 hours because he waked into the XPO yard without wearing his safety vest, even though he immediately put a vest on and was available to work at that moment. Tr. 1327:25-1328:18. XPO even put Mr. Avalos out of service based on the mistaken belief that Mr. Avalos' license had expired, despite Mr. Avalos proving otherwise, and he was not allowed to return to work until he prematurely renewed his license and showed the new one to XPO. Tr. 988:15-990:16; PX 87-88 (text message received by Avalos regarding his driver's license expiring). And XPO will also take a driver out of service pending an in-depth investigation by XPO into the accident. Tr. 453:10-21 (Freeman); *see* PX 245 (detailed accident investigation packet done and maintained by XPO); ; PX 38 (email chain between Freeman and Safety Director Samantha Arce reflecting a change in XPO policy that any driver with at least one preventable accident will be put on hold until a more detailed investigation is completed; Arce described the change as driven by XPO's internal "safety culture").

Without having had every single driver testify, it is likely that these are not even exhaustive lists of the reasons that XPO has used to terminate drivers or to put drivers out of service. What is indisputable, however, is that XPO does extensively rely on discipline in order to enforce its policies, which is a very strong indicator of XPO's pervasive control over drivers. While XPO may attempt to claim that it only takes these actions in compliance with federal regulations, for many of these violations it has admitted that is not the case. To the extent that XPO points to any specific regulation as requiring any of the policies described in this section,

that regulation should be discounted to the extent that it arises from XPO's chosen status as a motor carrier. In addition, the Region should closely scrutinize these claims to see if XPO in any sense goes beyond what is actually required. The CSA score, for example, may be calculated according to federal regulations, but it was XPO who set a 75 point threshold. Although drivers may have to submit logs, there is nothing requiring that XPO put drivers out of service if they are one day behind on logs, particularly when that is a day that the driver did not work. And although California law may require a 90-day BIT inspection, there does not appear to be any regulatory requirement that XPO obtain maintenance reports and receipts from each driver each month, or that it put drivers out of service if they do not submit those by the 1st or 7th of each month.

Thus, XPO's work rules and disciplinary systems must be viewed as very strong indicators of employee status.

(f) XPO's Total Control Over Customer Relationships Is A Strong Indicator of Drivers' Employee Status

In both of her decisions, Judge Dibble found that drivers "do not solicit customers for [XPO], have no control over rates charged the customers, and no meaningful interaction with them." ALJD II at 9. As a result, driver were unable to build up any substantive ownership interest in the work that they do, nor did they have any sort of proprietary interest over the routes they drove, the customers they serviced, or the business in general. *Id.* As a whole, XPO was the one that controlled "virtually all aspects of the company's interaction with the clients," which is a strong indication of employee status. ALJD II at 7. XPO has not introduced any evidence to challenge that conclusion. To the contrary, drivers continue to testify that they do not play any role in setting appointment times for customers. Tr. 946:15-947:5, 964:14-965:2 (Avalos); Tr. 1156:24-1157:2 (Alvarez). Drivers also universally testified that they do not contact customers

when there are issues with the assignments, instead they contact XPO directly. Tr. 794:15-24 (West); Tr. 962:9-963:9 (Avalos); Tr.1473:9-17 (Dominguez); Tr. 1523:25-1524:6 (Bañales). It is XPO's internal team—the planners and customer service—that work with customers on such issues. Tr. 217:21-218:4 (Freeman). Finally, drivers universally testified that they do not ever negotiate with XPO's customers. Tr**.** 995:13-25 (Avalos); Tr. 1238:1-9 (Aldrete); Tr. 1377:11-21 (Ramirez). Thus, XPO's control over customer relationships effectively eliminates any possible entrepreneurial opportunity driver could have from its relationships with those customers, and this supports a finding of employee status.

(g) XPO Controls Drivers by Requiring them to Engage in Certain Trainings Under Penalty of Discipline

In her initial decision, Judge Dibble held that "[t]he record is devoid of evidence that drivers receive evaluations, audits, or training." ALD I at 17. In her supplemental decision, however, Judge Dibble gave heavy weight to the fact that XPO "does provide required training to drivers who are charged with certain driving violations." ALJD II at 14. Moreover, although acknowledging that XPO provides voluntary trainings, "there continues to be no persuasive evidence that drivers are penalized if they do not attend" ALJD II at 14. As is becoming a pattern with many parts of this analysis, however, there is now strong evidence that this factor should weigh even more heavily in favor of employee status.

To begin, XPO continues to hold voluntary safety meetings and send regular safety messages about those meetings to all drivers, which is not something that most entities would do with true independent contractors. Tr. 439:14-440:7 (Freeman); PX 9, 59, 256-260. On top of that, however, drivers credibly testified about at least two *mandatory* safety trainings in the past several years. Specifically, one training regarding safety and one training regarding the transportation of refrigerated food (which is also noteworthy because there is no evidence that

XPO drivers have *ever* moved refrigerated food for XPO).). Tr. 1151:24-1153:12 (Vasquez); Tr. 1248:5-1250:16 (Aldrete); Tr. 1387:18-1388:23 (Ramirez);Tr. 1540:2-1542:15 (Bañales). Similarly, drivers testified about Hazmat trainings that XPO required them to do, along with Hazmat tests that XPO required them to pass. Tr. 1386:6-19 (Ramirez); Tr. 1128:20-19:8 (Alvarez); PX 247 (test for transportation of hazardous material). While it may be a requirement that *drivers* must take periodic tests to upkeep a HazMat certification, there is no evidence that federal law requires *XPO* to give that hazmat test to derivers itself or requires XPO to give these other required food and safety trainings to drivers.

Thus, there is even stronger evidence pointing to the fact that XPO's mandatory trainings for drivers indicate employee status.

(h) XPO Controls Rates and Other Compensation

As described in Section III.B.8 below, XPO exercises unilateral control over drivers' rates of pay. XPO's claims regarding negotiations by drivers are completely illusory—drivers do not negotiate with XPO and they do not negotiate with XPO's customers. Thus, drivers cannot exercise any entrepreneurial opportunity by negotiating or controlling compensation level, and this weights in favor of employee status.

(i) XPO Exercises Control Over Second-seat drivers

XPO attempts to buttress much of its argument around the contention that drivers are independent contractors because they exercise complete control over hiring second-seat drivers, which in turn provides a large level of entrepreneurial opportunity for drivers. As Judge Dibble already found, however, XPO's effective control over second-seat drivers negated any alleged entrepreneurial opportunity trucks owners might have had. ALJD II at 21-22.

Second seat driver do not apply and are not hired by truck owners—even when a second seat driver approaches a truck owner directly, the truck owner must refer that driver to XPO. Tr.

1202:19-1203:11 (Aldrete); Tr. 1309:15-24 (Vasquez); Tr. 1461:25-1462:13 (Dominguez). As described above, second-seat drivers are subject to the same onboarding qualifications, are subject to the same onboarding training, are given the same work policies as owners, and are subject to the same disciplinary rules as truck owners. Tr. 1163:6-21 (Alvarez); Tr. 1178:13-24, 1203:1-11 (Aldrete); PX 236.. In fact, Ruben Aldrete testified about one occasion where XPO explicitly prevented him from utilizing a truck driver who was otherwise qualified to drive under federal law. Tr. 1203:23-1204. Moreover, truck owners do not even have the ability to dispatch second-seat drivers or to take blocks of work from XPO and make business decisions about how to divide up those assignments—all driver, whether owners or second seaters, *must* be dispatched directly by XPO dispatchers, and drivers overwhelmingly testified that truck owners do not set work rules for second seaters. Tr. 947:6-11 (Avalos); Tr. 1369:8-12 (Ramirez).

It is thus not surprising that owners and second-seat drivers testified that nothing changed with their work when they switch from owners to second-seat drivers or back. XPO's overwhelming control over all aspects of the work makes owners and second-seat drivers essentially indistinguishable, and that control therefore extinguishes any actual entrepreneurial opportunity drivers could exercise if they actually controlled and hired second-seat drivers directly. It is also worth repeating that, to the extent XPO argues that it is required by federal law to have even second-seat drivers apply directly to XPO, this is once again a function of XPO's decision to operate as a motor carrier. If XPO merely contracted with bona fide motor carriers, XPO would have zero oversight or responsibility for drivers hired by that other motor carrier.

3. Drivers are Not Engaged in A Distinct Business or Occupation and the Worked that Drivers Do Is not Just Part of XPO's Regular Business, It is at the Core of XPO's Business

Two of the factors identified in the Restatement focus on the same premise because they are both concerned with the question of whether there is an actual distinction between the

putative employer and the worker, or whether the drivers are just component pieces in the putative employer's regular business. The facts in this case demonstrate that the driver's work is not just a part of the employer's regular business, it is at the very core of XPO's business.

As Judge Dibble recognized, '[t]he pivotal question" in this analysis is "whether the drivers are a regular an essential part of the company's business operations." ALJD II at 11 (citing *Roadway*, supra); *see also Velox Express, Inc.*, 368 NLRB No. 61 (Aug. 29, 2019) ("Velox is in the business of providing courier services, and the drivers are fully integrated into Velox's normal operations and perform a function that is not merely a regular part of Velox's business but is at the very core of its business.") (internal citations omitted); *Nolan Enters., Inc.*, 370 NLRB No. 2 (July 31, 2020) ("The judge also correctly found that the dancers are not engaged in a distinct occupation or business and are not rendering services as an independent business."); *Intermodal Bridge Transp.*, 369 NLRB No. 37 ("The judge also correctly found that the drivers are not engaged in a distinct occupation or business and are not rendering services as an independent business, and their work is part of the regular business of the Respondent."). Despite XPO's hollow attempts to invent a difference between drivers moving containers and XPO "performing logistical coordination between customers, ports, and rail yards," Judge Dibble correctly found that XPO "could not perform its function without the drivers [and] [w]hen performing this function for the Respondent, drivers use their trucks which are emblazoned with the Respondent's name and logo. To the casual observer, most likely, the driver and truck are indistinguishable from the Respondent." ALJD II at 11-12; *see also Sisters Camelot,* 363 NLRB at 163 (citing *Dial-a-Mattress,* 326 NLRB at 892–93).

All of that remains true. The drivers' work is one portion of the longer move that XPO commits to executing for each intermodal customer, and without the drivers to get the container

to the railyard and then to the customer, these intermodal moves could not occur. Tr. 50:2-51:8 (Tibbetts). Thus, the Region must give his factor heavy weight in the analysis. *United Ins. Co.*, 390 U.S. at 258–59 ("What is important is that the total factual context is assessed in light of the pertinent common-law agency principles. When this is done, the decisive factors in these cases become the following: the agents do not operate their own independent businesses, but perform functions that are an essential part of the company's normal operations . . . ."). As the Board has persuasively held:

> We also view as important the fact that the Respondent's business is entirely devoted to and dependent upon the operations carried out by the individuals . . . . While this facet . . . is, of course, not alone determinative of the status of the operators, we believe it to be of value in the assessment . . . . . In this connection it should be noted that the duties of the drivers are not of a transient nature but are an integral, and thus continuing, part of the enterprise. We do not have an instance herein of individuals performing duties which are subsidiary or even corollary to the principal services offered by the company. The transportation of new cars by trailer-trucks constitutes the sole business of the Respondent and the maintenance of that traffic requires the employment in one form or another of qualified drivers. To accept the Respondent's contention that these operators are engaged in individual business enterprises would require us to consider the Respondent to operate in a manner analogous to a holding company. We do not believe the Respondent to be so divorced from the actual performance of its business.

Nu-Car Carriers, Inc., 88 NLRB 75, 76 (1950). Indeed, it is difficult to imagine any business entity being as divorced from work at the core of its success as it would need to be for the individuals performing that work to actually be independent contractors under the law. That is likely why, although it could, XPO chooses not to have core carriers—actually independent motor carriers—do all the work currently done by the petitioned-for unit. Tr. 414:13-415:3 (Freeman).

To attempt to escape this inevitable conclusion, XPO will continue to harp on the fact that some drivers have a registered LLC, or have multiple trucks, or have a second-seat drivers, or have their own operating authority, arguing that each of those facts establish the drivers as

independent business entities. In particular, XPO will point to the 72 documents it alleges demonstrates drivers who have corporate entities they use with XPO, the 34 documents they claim are DOT numbers belonging to drivers in the petitioned-for unit (although it is worth noting that none of those drivers use those DOT numbers to operate for XPO, as XPO admits that all drivers in the petitioned-for unit operate under XPO's operating authority); and the approximately 51 second-seat drivers across both facilities. EX 17-31 and 33-131. But the facts of the drivers' relationship with XPO does not support XPO's contention that these facts make those specific entities independent businesses, much less have any effect on the employee status analysis for the remainder of the 266 drivers in the petitioned-for unit who do not have their own entities, their own DOT numbers, or any other drivers, or even a truck themselves.

To begin, aside from the existence of these entities and of these registered DOT numbers, there is no reliable evidence in the record that any driver actually utilizes the entities for any purposes other than working for XPO, nor any evidence that any of the individuals with DOT numbers actually use those DOT numbers to operate for other entities. The closest XPO comes to such evidence is vague testimony about two drivers, at least one of whom no work for XPO, allegedly operating under their DOT number for other companies. Tr. 326:21-327:11 (Freeman). Even these drivers, however, operated under XPO's operating authority while moving containers for XPO. Tr. 413:9-14 (Freeman). Moreover, XPO failed to introduce any documentary evidence of the work allegedly done by these drivers for other entities. Considering the fact that Schedule T of the ICOC explicitly required drivers who are operating the vehicle under their own DOT number for other entities must provide certain documentation to XPO—including information about the entity to whom they are providing the service and information about the loads that would be moved. EX 13 at 78. Had any driver ever actually exercised the Schedule T provisions,

XPO would have documentary proof of this submission and the absence of such proof on the record means that the Region must discount XPO' unsupported anecdotal evidence. Similarly, Schedule T requires that any driver operating for another carrier under that other carrier's authority must submit certain documentation and an executed sublease. *Id.* XPO's failure to introduce any such documentation means that XPO has failed to carry its burden of showing that *any* driver ever worked for another company while working for XPO, particularly in light of drivers' consistent testimony that they work exclusively for XPO. Tr. 998:2-15; Tr. 1120:9-22 The fact that these entities and DOT number are not actually being used for any entrepreneurial purposes, and that there is no hard proof that drivers works for other companies, means that XPO's claims should receive zero weight in the employee status analysis.

Moreover, there is also direct evidence that XPO *prevents* drivers from being able to drive for other entities. Both Driver Yabio and Driver Avalos testified that they were told that they could not use their trucks to work for other entities. Tr. 1445:9-11:5; Tr. 949:20-25:1. Ruben Aldrete, for example, recently attempted to obtain his own DOT number so that he could actually do work for a friend who he knew that was looking for a driver. Tr. 1253:22-1254:19. Mr. Aldrete started the process and then went to speak to XPO about exactly what he would need to do so that he could use his truck to do that outside work, and XPO immediately dissuaded him from doing it by stressing how difficult it would be and emphasizing all the stuff he would need to comply with once he started doing it—dejected, Mr. Aldrete abandoned that opportunity for now believing that in actuality he would have to quit XPO in order to do that other work. Tr. 1254:17-1255:19. Similarly, Juan Vasquez had previously operated under his DOT number, but when he started at XPO he was explicitly told that he *could not* operate with his own DOT number, so his DOT number is no longer active. Tr. 105:11-107:21.

XPO's arguments regarding drivers owning multiple trucks or having second-seat drivers are equally unavailing. As described above, XPO exercises significant control over second-seat drivers—XPO must approve a second seat driver, second-seat drivers receive their dispatches exclusively from XPO, second-seat drivers are subject to XPO's rules and discipline but do not receive any work instructions from the truck owners. *See also* Tr. 1516:20-1517:6 (Bañales); Tr. 1461:25-1462:13 (Dominguez); Tr. 1419:2-16 (Samayoa); Tr. 1290:10-11, 1311:10-1312:25 (Vasquez); Tr. 1198:16-1199:1, 1207:1-18 (Aldrete). As Judge Dibble found, this extensive control by XPO over the second-seat drivers, and in particular "over whether to authorize or terminate their ability to drive for XPO, renders almost meaningless the drivers control over second-seat drivers" and any attendant entrepreneurial opportunity that would otherwise exist. ALJD II at 20. This can be seen directly in the case of Mr. Aldrete, who went out and found a friend who was already federally qualified to drive and was actually driving for any company, but XPO prevented him from having his friend driver Mr. Aldrete's truck because he did not meet XPO's specific qualification requirements. Tr. 1203:23-1204:1. Similarly, as described below, XPO's control over the trucks that drivers use to work for them, and the limitations it places on those trucks being used to work for other companies, renders null any possible entrepreneurial opportunity.

When these facts are coupled with the additional reality that most drivers lack any of the necessary instrumentalities to actually go out and operate on their own, there is no question that drivers are not engaged in a distinct business or occupation and are instead an integral part of XPO's operations. Thus, this factor weighs heavily in favor of employee status.

4. XPO Exercises Effective Supervision and Provides Direction to Drivers

When determining whether this factor supports employee status, the Board has rejected the argument that employers must directly supervise every moment of an employees' workday in order to establish an employment relationship. Instead, the Board has made clear that any analysis regarding the level of supervision must be grounded in the nature of the work in question. *See Sisters Camelot,* 363 NLRB at 164 ("the nature of the work makes such in-person supervision highly impractical."); *FedEx,* 361 NLRB at 621 (because of nature of truck driving, drivers who were "ostensibly free of continuous supervision in their work duties" were found to be employees). When direct, in-person supervision does not fit the nature of specific job, the Board has found sufficient supervision through indirect methods such as requiring "constant contact" from employees, *OS Transp. LLC,* 358 NLRB 1048, 1063 (2012), or requiring employees to fill out detailed paperwork regarding their workday, *Sisters Camelot,* 363 NLRB at 164.

That is why Judge Dibble did not assign any significance to the fact that XPO's "drivers are not supervised while driving and have discretion in choosing the delivery route"—rather than indicating any independence, this fact merely "reflects the nature of the job itself" because trucking is not the type of professional where even employee drivers are directly supervised while they are working. ALJD II at 12. "Such supervisions would be unrealistic given the type of work the drivers perform." *Id.* at 13. Instead, as in *OS Transport,* drivers are instructed to immediately contact XPO regarding any issues with the assignment or if they are running late—they do not contact XPO's customers, nor the owners of the trucks they are driving. Tr. 947:12-14; 962:9-963:8; 964:14-965:2; 1319:1-5; 1376:8-12; 1473:9-17; 1523:25-1524:6. Drivers are also instructed to call dispatchers after they finish an assignment of the day, so that the dispatcher can then exercise their discretion about what route to assign next, based on XPO's

need. Tr. 946:6-14 (Avalos). And like in *Sister's Camelot*, drivers are required to fill out detailed paperwork tracking the work they complete throughout the day—from a manifest to delivery memos to hand tickets to a logbook (which is now filled out and submitted electronically instead of on paper).[21] Tr. 945:23-946:5; 991:1-23; 1227:16-1228:24; 1320:14-1321:25; 1376:23-1377:10).

Further, another direct example of supervision that Judge Dibble did not even address in her most recent decision—possibly because this is a newer XPO policy—is that XPO is able to and actually does electronically track drivers' location throughout the day. Tr. 213:22-214:6; Tr. 1635-37 (discussing PX 287 and geofencing); EX 3 (example of an intermodal move that demonstrates the significant level of oversight and coordination, including constant monitoring of load, needed to effectuate a timely move and meet customer demands). As multiple drivers testified, XPO is able to tell where they are located and drivers will actually receive calls from dispatchers where it is apparent that the dispatcher knows the drivers' precise location or the dispatcher will know that the driver is running late without the driver having to say anything. Tr. 963:9-21; 9:65:7-9; 1227:2-14; 1319:6-1320:13 (body shop); Tr. 1376:13-22. As Troy Tibbetts explained, "there's a high level of complexity associated with managing the estimated times of arrival and managing customer expectations," which is why XPO receives continues updates about the cargo. Tr. 46:2-13; EX 3. In fact, in its advertisement to clients, XPO touts the fact that "drayage drivers are equipped with mobile communication devices, and all XPO containers are digitally monitored, including geolocation and automated status notifications." PX 283. In other

[21] Although XPO may argue that it is required to monitor drivers' logbooks, as explained above, even such governmental requirements should be attributed to XPO because of XPO's choice to operate as a motor carrier. It is also worth noting, however, that XPO does exceed federal requirements because there does not appear to be any federal requirement that, for example, XPO require manifests on a daily basis from drivers.

words, XPO promises its customers "real-time visibility into freight status [and] up-to-the-minute delivery tracking . . . ." *Id.* And the only way it accomplishes that is by electronically monitoring drivers and instructing drivers to utilize XPO's software to provide "real-time" updates about their work. PX 1 (Intermodal Fleet instructions (English) describing that XPO provides real time updates and asks drivers to use IF in real time.); PX 279; 280. It is difficult to imagine a more direct form of supervision in the trucking industry, and yet Judge Dibble found that this factor supported employee status even without relying on this type of electronic supervision.

Similarly, Judge Dibble did not address the occurrence of random gate inspections. These inspections consist of XPO's safety specialists essentially going out into the field to monitor drivers' performance. Tr. 214:9-215 (Freeman). Specialists will "visit a railroad terminal and just meet with some of the owner-operators and see the shipments, talk with them, and check on the condition of the equipment they're pulling." *Id.* Safety specialists will do random inspections and will check the drivers' vehicles, directing drivers to make repairs where necessary. *Id;* PX 35 (September 2018 safety action plan email diercting XPO terminals to "increase the number of walk around inspections" to reach 15% goal). Safety specialist to bring in drivers to safety department to address HOS violations. Drivers who do not show up within 72 hours to address violations will be placed on dispatch hold until violations are addressed.) . Each terminal was directed by the Regional Safety Manager to conduct these gate inspections a certain number of times per week. Tr. 420:24-25; PX 25 and 32 (Email and attached spreadsheet from director of safety Samantha Arce to safety specialists with list of duties for safety specialists). Again, this is a hallmark method of supervision for a fleet of employees who do regular work at specific

locations outside the employer's premises—such as a UPS supervisor doing a road check, or a bussing operator observing busses at their bus stops.

Without even having evidence of those clear forms of supervision, Judge Dibble relied primarily on the "direction" aspect of this factor rather than the "supervision" aspect to find that this factor weighted in favor of employee status, giving heavy weight to the fact that XPO provides direction to drivers on how to do their work, and enforces disciplinary action against them—even if such disciplinary action is rare. For example, Judge Dibble pointed to training and counseling provided by XPO, and also found significant XPO's policy of terminating employees for accumulating 75 CSA points. As described above, not only is there no evidence of XPO explicitly rescinding or ending its practice of providing these trainings and counseling's, but there is strong evidence that XPO continues to use discipline to enforce the direction it gives drivers and the policies it establishes. Thus, not only did XPO fail to carry its burden of showing that Judge Dibble's reasoning is no longer applicable, there is now even stronger evidence that driver operate under XPO's direction and supervision. Hence, this factor continues to support employee status and should be given heavy weight in that analysis.

5. Drivers Skill Supports Employee Status Because They Are Exercised in Furtherance of XPO's Enterprise

There is no question that "driving a commercial truck requires specialized skills," *Intermodal Bridge Transp.,* 369 NLRB No. 37. The mere existence of specialized skills, however, does not support a finding of independent contractor status. After all, employees across the country develop a plethora of special skills through both schooling and experience, skills that they exercise and leverage between different employers without ever becoming independent contractors. Thus, as the Board recognized in *Intermodal Bridge Transport*, the skills inherent in driving a commercial truck support a finding of employee status in this case because "the drivers'

skills are inherent to the performance of the drivers' duties in furtherance of the employer's business, consistent with the common-law definition of an employee." *Id.* Thus, as Judge Dibble recognized in her second decision, XPO "would be unable to carry out its core missing without the drivers' skill at hauling goods in commercial vehicles," meaning that this factor supports a finding of employee status. ALJD II at 14.

Judge Dibble also found that this factor further supported employee status because XPO "does provide required training to drivers who are charged with certain driving violations." *Id.* This finding is further bolstered by the fact that during the instant hearing, even more evidence arose that XPO provides training and tests its drivers to ensure that they do have the skills that XPO needs them to have so that XPO can operate its business. To begin, there was extensive testimony from drivers that they were required to do video trainings and answer subsequent test question when they applied for work as far back as 2012, and as recently as 2020, with drivers seeing few if any differences between those required trainings. PX 249 (List of trainings: CSA driver series-8 part training and test for F. Ramirez all conducted in 2016) PX 261 (List of training videos: JJ Keller trainings regarding distracted driving prevention, hazmat, hours of service training, sanitary food, vehicle inspections and ELD.) Further, drivers testified that on at least two occasions in the recent past, they have been required to do other specific trainings by XPO under penalty of not being able to continue working if they refused to do the trainings or if they were unbale to pass the subsequent evaluations. In other words, not only are drivers' skills used in furtherance of XPO's business, but XPO plays a direct role in training and ensuring drivers have the skills it requires. This factor thus supports a finding of employee status.

6. XPO Supplies and Controls The Key Instrumentalities of the Drivers' Work

In her initial decision, Judge Dibble gave this factor only a cursory analysis and essentially held that this factor automatically supported independent contractor status because "drivers supply the most essential tool for the work, the tractor truck [and] [t]he driver is responsible for choosing, purchasing or leasing, maintaining, repairing, insuring, and all the other responsibilities that come with owning the truck." ALJD II at 18. In her supplemental decisions, however, Judge Dibble recognized that this factor needs a more substantive analysis. To that end, Judge Dibble clarified that "operating authority is a crucial instrumentality in the drivers' ability to perform work for the Respondent. Without the state, or federal operating authority, the drivers would be unable to haul goods for the Respondent's customers; and the Respondent would be unable to fulfill its core mission." ALJD II at 15-16. Despite this acknowledgement, Judge Dibble incorrectly weighted the competing instrumentalities and found that "the *most* significant and consequential instrumentalities are provided by the drivers." ALJD II at 16. Based on the evidence before it, the Region should find that this factor actually supports a finding of employee status.

To begin, it is true that some driver do own or lease the vehicles they are utilizing to do XPO's work. Even with those drivers, however, XPO has and continues to play a direct role in encouraging and facilitating drivers' to obtain trucks because doing so benefits XPO both by ensuring XPO has the number of trucks it needs to do its work and by divorcing XPO from that process to give it plausible deniability. As Judge Dibble found, XPO's predecessor actually leased vehicles directly to drivers through a wholly owned entity created solely for that purposes, PX 130 (Avalos truck lease agreement signed 2012), and this entity continued to lease vehicles to drivers throughout 2016, long after XPO took over operations from Pacer. ALD I at 6. Considering how many drivers have been working at XPO since before 2016, the existence of

this leasing program continues to chip away at any significance attributable to drivers' ownership of trucks. *Roadway Package Sys., Inc.*, 326 NLRB 842, 851-52 (1998) (reasoning that company's "facilitat[ing]" drivers' vehicle ownership weakens showing of independent contractor status). Moreover, even after XPO stopped leasing vehicles directly, XPO continued to be involved in this process by providing significant monetary incentives to drivers, incentives which actually pushed drivers to purchase trucks when they otherwise might not have. Tr. 1527:15 (Alvarez, $5000 bonus in 2019); Tr. 1201:7-9 (Aldrete, describing two separate bonuses for approximately $5000 and for $2500). XPO also plays a role in ensuring that second-seat drivers obtain access to a vehicle. Mr. Avalos, for example, explained how he applied for work and it was only after that that the company introduced him to the owner whose truck he would start using. Tr. 944:7-21. XPO also currently maintains a list of owners that it can connect to second-seat drivers when second-seat drivers come looking for work. Tr. 1204:2-1205:11 (Aldrete); PX 234.

Moreover, even putting aside XPO's involvement in drivers' having access to a vehicle, XPO's control over those vehicles also negates any significance or entrepreneurial opportunity attributable to those the vehicles. Two drivers testified that they were told, explicitly and without a reason and without there ever being a retraction, that they could not use the vehicles they were using to work for XPO to work for other companies. Tr. 949:20-950:1 (Avalos), 1145:9-1146:5 (Yabio). Moreover, Mr. Aldrete inquired about driving for other companies even using a separate DOT number, but he was dissuaded from doing so by XPO. Tr. 1254:17-1255:19. This is not surprising considering the fact that Schedule T actually limits on when drivers can work for other companies, sets requirements drivers must meet and mandates certain submissions to XPO by the

drivers.. EX 13 at 13.[22]. While XPO's witnesses gave vague testimony about some drivers who did do work for other companies while also working for XPO, driver witnesses overwhelmingly testified that they had not worked for any other company during their tenure for XPO—many of them have been working for XPO exclusively for full-time schedules for years on end. Tr. 998:2-15 (Avalos), 1120:9-22 (Alvarez), 1145:9-1146:5 (Yabio).[23]

Moreover, even within XPO, XPO controls and places limits on drivers' use of their own trucks. One example of this is that XPO has to approve every time a driver is going to drive a new vehicle—whether that is a second-seat driver switching from one truck owner to another, or a second seat driver switching from one truck to another truck owned by the same owner, or even a truck owner switching himself between two of his trucks if one of his trucks breaks down. Tr. 1368:25-1369:2 (Ramirez), 1313:7-22 (Vasquez), 1201:14-23 (Aldrete), 868:9-15 (Naemo),

[22] A driver looking to use their truck for a purpose other than to drive for XPO needs to (1) obtain XPO's authorization and release, (2) consent to a third party vendor to monitor drivers employed by the truck owner, (3) submit any shipping documents and obtain an fees from the Sublease Carrier, (4) cover all XPO identifying logos and stickers, (5) assume all responsibilities and costs while the truck is in use on behalf of the Sublease Carrier, (6) obtain separate public liability insurance, (7) consent to XPO being the reporting entity for fuel tax reporting for all alternative uses of the truck, (8) consent to XPO being responsible for reporting miles traveled by the truck with regard to the International Registration Plan and promptly provide XPO with documentation showing all miles traveled by state for each trip, (9) submit driver's log to XPO after every trip, (10) prepare and submit to carrier a written Driver Vehicle Inspection Report, and (11) consent to applying all terms of the Independent Contractor Operating Contract to alternative use operations.

[23] According to Schedule T, XPO would have to have maintained records of drivers that actually did work for other companies while working for XPO, and XPO's failure to produce any such records means that XPO has failed to prove that driers do actually work for other companies, meaning that any alleged opportunity there is merely theoretical.. EX 13. Moreover, considering XPO's level of control, even if drivers were allowed to work for other companies, this "does not so much reflect significant entrepreneurial opportunity as it does the part-time nature of [the individual's] work." *Velox*, 368 NLRB No. 61, slip op. at 4; *see also Nolan Enters.*, 370 NLRB No. 2 (ability to do outside work "does not establish that they are a distinct business, as they would be equally reliant on that other [company] in the same way they are on Respondent.").]

901:4-7 (Zouri). XPO has even informed a second seat driver that there was a limit on how many times XPO would allow him to switch from one driver to another. Tr. 1367:7-1369:2. Similarly, XPO monitors whether drivers are actually using their vehicles to work for XPO and will terminate a drivers contract if they do not drive for XPO for 35 days—after all, XPO admits that it has a vested interest in ensuring those trucks, part of its fleet, are actually operating in its service and XPO "cannot afford to have unused trucks sitting here which are not benefitting XPO." Tr. 302:1-8 (Freeman). XPO also requires drivers to do certain inspections with XPO's mechanic, and requires that driver submit detailed reports and receipts regarding the trucks' condition. XPO even compensates drivers for having clean inspection reports, to the tune of $75 to $400. Tr. 1242:19-25 (Aldrete) . None of this would be the case if truck owners actually had full control of their vehicles and were able to actually exercise any entrepreneurial opportunity that may arise from that ownership. The Region should find that in the particular factual circumstances of the instant case, truck ownership is not a significant instrumentality and XPO's control over that instrumentality limit's any theoretical entrepreneurial opportunity.

Thus properly placing the significance of the vehicle, it becomes much easier to see that the balance of instrumentalities—and driver's lack of real entrepreneurial opportunity—lead to a conclusion that this factor actually supports employee status. As Judge Dibble recognized, operating authority is also a critical instrumentality and, although XPO claims that a handful of drivers do have their own operating authority, XPO's witnesses admitted that all of the petitioned-for unit actually provides services to XPO under XPO's operating authority. Tr. 413:9-14 (Freeman), 832:10-833:6 (Moore). This means that these drivers are legally unable to actually function as independent businesses in the industry, and they are completely dependent on XPO to be able to work. Similarly, XPO's complete control over customer interactions, its

relationships with those customers, and its contracts with those customers are another key instrumentality that drivers to not provide or possess. Tr. 53:2-10 (Those individuals don't have the access to the variety of customer base that we have, right? So we have the ability to commit to large amounts of volume and it's a pool of prequalified capacity)**.** In other words, customers would not want to contract with individual motor carriers, making clear the lack of any possible entrepreneurial opportunity.

Similarly, because of the complexity of the industry, XPO utilizes extensive administrative support staff to support its business and the work that driver do, which is at the core of its business. From scheduling with customers, to coordinating, to billing, to complying with federal regulations (most of which XPO imposed on itself), XPO requires and provides a huge level of support to drivers. Support that drivers do not themselves possess, and without which drivers are unable to operate. Driver also do not own or have any way to obtain chassis or containers outside of XPO providing them through its affiliated business entities. Tr. 648:6-649:19 (Limuaco); 1294:23-1295:22 (Vasquez); 1379:18-22 (Ramirez). There is no evidence that drivers' regularly obtain and provide their own insurance instead of using the insurance provided by XPO, and it would be much more expensive for drivers not to use the insurance provided by XPO. Tr. 769:5-17 (West) . See also Tr. 843:25-844:4 (Moore). XPO provides the tablet and the dispatch programs that drivers need to do their work. And XPO even supplies a mechanic and pays for drivers' required inspections. Tr. 616:22-25 (Limuaco). XPO supplies license plates for drivers that wish to do out of state runs. Tr. 297:21-298:3 (Freeman). XPO provides parking inside its yard at the Commerce facility, and in San Diego drivers typically park right outside the XPO facility. Tr. 240:20-25 (Freeman)..

Thus, this factor supports a finding of employee status.

7. Drivers Have a Long Term Working Relationship With XPO

In *United Insurance Co.*, 390 U.S. at 259, the Supreme Court noted that "permanent working arrangements . . . [that] continue as long as their performance is satisfactory" are indicative of employee status. Although employers quickly tried to evade this fact by instituting fixed-term contracts for their misclassified employers, the Board easily saw through this subterfuge and made clear that it is the actual nature and length of the working relationship that matters, not a mere recitation in a contract. *See e.g. Nolan Enters.*, 370 NLRB No. 2 (factor supports employee status because despite fixed length of written contracts, drivers actually worked "between 1.5 and 4 years" or "on and off, for over 20 years."); *Velox*, 368 NLRB No. 61 (factor supports employee status when contracts were in function open-ended and auto-renewed).

That is why Judge Dibble found that although the ICOC purports to have a 90-day term, in practice drivers have opened ended working relationships with XPO—ICOCs renew automatically for drivers who operate as legal business entities rather than as individuals, individuals can continue accepting assignment under the ICOC's term for up to 90 days after the ICOC expires even if they do not sign a new ICOC, every single driver who testified in the ULP hearing had worked for XPO for at least two years, and XPO's own witness admitted before Judge Dibble that drivers remain on their contracts for "10, 20, 30 years . . . ." ALJD II at 17.

The evidence from the instant hearing provides even stronger support for the conclusion that drivers have open-ended working relationships with XPO. The list of approximately 266 current drivers introduced by XPO (which including both San Diego and Commerce) demonstrates that 47 drivers, or approximately 18% of drivers, were already working at these facilities when XPO took over from Pacer in 2015—some of them from as far back as the early 2000s. Then, there are 22 drivers who have been working since 2016, 42 drivers who have been working since 2017, 39 drivers who have been working since 2018, and 32 drivers who have

been working since 2019. This means that over 68% of XPO's drivers have been working at XPO *for at least two years*. This mirrors the drivers who were found to be employees in *Intermodal Bridge Transport,* where the long tenure of 80% of the drivers "suggest[s] that the drivers function as a permanent work force" and therefore supports employee status. *Intermodal Bridge Transp.,* 369 NLRB No. 37.

8. XPO Unilaterally Sets Payment Rates and the Method of Payment

XPO's argument regarding the method of compensation remains unchanged from the argument it made before Judge Dibble. In short, XPO continues to argue that this factor should support independent contractor status because it does not pay drivers hourly, because drivers are not guaranteed a certain level of revenue, because drivers can and do negotiate some aspects of their compensation, and because the wide range in the gross amount paid to each truck driver on a yearly basis is "proof" that drivers have and exercise entrepreneurial opportunity. *See e.g* ALJD II at 17. And as Judge Dibble did, the Region must see past these superficial arguments and must find that this factor supports employee status because: "the pay rates for deliveries, fuel surcharges, accessorial related fees, hazardous materials shipping premium, labor charges, chains/tie downs, wait times, and a host of other fees are determined by [XPO], . . . [XPO] negotiates with clients, without input from drivers, over the rates it will charge customer," drivers were not involved in setting mileage rates, XPO can and does change these amounts unilaterally, and although XPO places heavy weight on the premiums that it offers drivers, "there was no persuasive evidence showing that the drivers are an equal partner in setting the premium rates or deciding when to offer them[, t]he premium rates are just another way for [XPO] to compensate drivers." ALJD II at 18. Every single one of those facts remains true.

XPO continues to unilaterally draft Schedule B, which contains the pre-determined compensation rates set by XPO for everything from the base line-haul rate to all the ancillary and

accessorial compensation that drivers may earn through the course of their workday. Tr. 344:11-22 (Freeman); 342:21-343:12 (Freeman), EX 6, 7. There is no evidence that any driver has played a direct role in setting or changing any of the compensation rates in these documents. In fact, the agreement itself contemplates that XPO *will* provide updated copies of this Schedule on a quarterly basis or as often as XPO finds necessary, and that drivers are forced to accept these new rates within fifteen days if they wish to continue working for XPO. *Id.* at 1. The Schedule B is prepared at the corporate level and then provided to the terminals. Drivers uniformly testified that they do not negotiate with XPO's clients, and XPO did not introduce any evidence to contradict such testimony. *See* Tr. 995:13-25 (Avalos); Tr. 1377:11-21 (Ramirez); Tr. 1238:1-9 (Aldrete). Drivers also consistently testified that they do not and cannot negotiate their rates with XPO and that on the occasions where they have tried, they have been shut down. Tr. 1125:10-1126:7 (Alvarez); Tr. 1236:18-1237:14 (Aldrete).

Although XPO continues to argue that "negotiation . . . happens on a daily basis" in the form of unplanned premiums paid to drivers, this is based on nothing more than vague and unsupported testimony—there is no concrete evidence that actual negotiations occurs over these unplanned premiums, much less that such negotiations are a regular occurrence. Drivers consistently testified that they have never negotiated the amount of a premium, and their description of the premium reveals their true nature—they are just another form of compensation controlled by XPO and which XPO decides to offer drivers when it needs drivers to complete particular work or to work during their off time, such as on weekends. *See e.g.* r. 1089:13-19 (Avalos), 1200:22-1202:2 (Ramirez), 1446:17-1448:4 (Yabio), 1473:17-1474:16 (Dominguez). Josue Alvarez explains that that "they do give us a premium. But that's already a premium that's already set by XPO. We don't have any word on that. Like, they set it, and then, we can't

negotiate that. It's already set." Tr. 1125:10-16:7. And Juan Vasquez explained that he cannot negotiate the amount of a premium because "they are the ones who – who – who decide that," and explained that on two separate occasions he attempted to ask for a premium that was not offered to him and was outright refused, told that those assignments did not have premiums attached to them. Tr. 1323:2-25 (Vasquez). When XPO explains these unplanned premiums, it makes clear that it sets limits on what dispatchers would actually be able to offer drivers. Tr. 311:6-10 (Freeman); Tr. 149:1-9 (Darling). And even XPO's own driver witness makes clear that there is no opportunity to negotiate premiums because "everything is preset. There's no haggling." Tr. 763:12-18.[24]

One nuance that XPO has attempted to introduce into its argument is nothing more than wordplay. In essence, XPO attempts to characterize the periodic adjustments it makes to compensation—the exact type of salary adjustments that any employer makes to remain competitive, particularly in a tight labor market—as some form of "negotiation" because XPO takes into account market conditions. Tr. 244:18-22 (Freeman); Tr. 611:21-612:4, 650:21-651:2 (Limuaco); Tr. 130:14-18 (Darling). But this framing strains credulity. Instead, the more logical reading of the evidence presented by XPO and by drivers is that XPO maintains complete control over wages paid to drivers, but XPO has become very dynamic and responsive in how often it is adjusting those rates so that it can remain competitive both for its customers, and in the labor market. The majority of this comes in the form of quarterly adjustments to the Schedule B

[24] EX 289, under seal, shows summary data on premiums by lane, yet XPO failed to introduce any evidence that the premiums that were paid varied in any capacity. XPO clearly has the capacity to do so—the information it queried to compile this data no doubt contained the breakdown of each individual premium payment. XPO's failure to introduce such evidence means that it has failed to meet its burden of showing that these premium rates were anything other than another form of compensation unilaterally set and offered by XPO.

amounts, adjustments aimed at finding that lowest possible amount that XPO could offer which would ensure that it has sufficient drivers to do all of its work. When XPO miscalculates and drivers will not do certain work at the Schedule B rates, XPO will make the decision to offer premiums on those loads. Tr. 326:6-12 (Freeman). Then, when it comes time to issue a new Schedule B, XPO takes into account the premiums it had had to offer and then adjusts the Schedule B rates accordingly so that it can stop paying premiums. *Id.*; Tr. 650:21-651:6 (Limuaco); Tr. 318:12-15, 325:10-326:12 (Freeman).

The other argument that is arising de novo in the instant proceeding is XPO's claim that it cannot have an employment relationship with second-seat drivers because it does not pay them directly—instead, they receive their payment from the truck owners whose trucks they use. On its face, this argument fails because method of payment is just one factor in the analysis and it cannot be treated as determinative. When the other incredibly strong indicia of employment status are weighed against the fact that XPO has instituted a convoluted compensation system that gives it even more protection from liability by making it so that it does not have to pay a portion of its workforce directly, it is clear that even second-seat drivers are XPO's employees. Moreover, there is also strong indicia that XPO does play at least a minor role in compensation for second-seat drivers: XPO specifies which driver did what work in the settlement statement it gives truck owners,, second-seat drivers also get offered premiums in the exact same manner as truck owners, Tr. 714:16-17 (Limuaco), and when second-seat drivers have issues with premiums they will speak directly to XPO rather than to the truck owners. Tr. 975:5-14 (Avalos)

Relatedly, XPO also argues that it does not control the amount that truck owners pay second-seat drivers, which means that truck owners exercise entrepreneurial opportunity in making that decision. Although superficially this argument may appear attractive, it crumbles

under the weight of even the slightest scrutiny. As described above, XPO exercises extensive control over second-seat drivers, from having the power to approve or reject second-seat drivers, to subjecting second-seat drivers to the same rules and disciplinary systems as truck owners, to dispatching second-seat drivers directly and thus controlling the assignments they are able to do. As Judge Dibble already found, XPO's "ultimate control over whether to authorize or terminate [second-seat drivers' ability to drive for it] renders almost meaningless the [owners'] control over second-seat drivers. ALJD II at 20. When XPO's control over second-seat drivers' ability to work and assignments is compounded with XPO's absolute control over total per-assignment compensation paid to the truck owners for work done using their truck, it becomes clear that any alleged entrepreneurial opportunity arising from owner's ability to pay drivers is completely illusory. XPO is already doing complex calculations to figure out the absolute lowest amount it can pay for an assignment, taking into account the operating expenses that have unlawfully been foisted on drivers by virtue of their misclassification. This amount then sets the parameters of any "discretion" that truck owners have—what they can offer second-seat drivers is completely constrained by what the total they receive from XPO, which they cannot negotiate, and by their expenses in operating the vehicle being used for that move. It is thus no surprise that drivers speak with each other about these amounts and multiple drivers believe there to be some level of standardization between what second-seat drivers earn. Tr. 1499:6-14 (Dominguez); Tr. 1021:13-1023:3 (Avalos); Tr. 1500:11-13; 1505:15-1506:14.

Finally, it is worth noting that XPO's very decision to compensate drivers on a piece rate basis where XPO's income is tied to the number of assignments completed by drivers is a strong indicator of employee status. After all, "[w]hen an employer does not share in a driver's profits from fares, the employer lacks motivation to control or direct the manner and means of the

driver's work." *SuperShuttle.* 367 NLRB No. 75, slip op. at 19 (citing *Metro. Taxicab Bd. of Trade,* 342 NLRB at 1309–10). In *Nolan,* for example, the employer earned more revenue the more work that its dancers did, just like XPO's profits increase the more work its drivers do because it needs those drivers to do this work in order to receive its payment from its customers. *Nolan Enters.,* 370 NLRB No. 2. The Board contrasted this with *SuperShuttle,* where drivers only paid a fixed rate to the company no matter how much work they did, and the drivers were able to keep any difference between the work they actually did and the base rate paid to the company. The Board concluded that the fact that the employer's revenue was tied to the dancer's work and income "militates against a finding of independent contractor status" because it gave the club more of a vested interest in the work and efficiency of the dancers, just like XPO has a vested interest in the work and efficiency of its drivers. *Id.*

Thus, all of XPO's arguments are unavailing and the method of payment factor continues to strongly support employee status.

9. XPO Drivers Believe They Are Employees

In both of her decisions, Judge Dibble found that this factor supported a finding of employee status, whether or not this factor was viewed through the prism of entrepreneurial opportunity. Once again, XPO has not presented any new evidence or novel arguments that would upset this conclusion by Judge Dibble. Instead, XPO appears poised to for the second time "reiterated its initial argument that its failure to provide drivers benefits, withhold taxes from the drivers' pay and the drivers signing the ICOC, which is replete with references to the drivers establishing an independent contractor relationship with the company, are proof the drivers knowingly created an independent contractor relationship."[25] Judge Dibble, however, rejected

[25] ALJD II at 19

this argument, even taking into account the fact that some of XPO's witnesses did state that they saw themselves as independent contractors.

Further, Judge Dibble found that this factor supports a finding of employee status even assuming that drivers were aware of and understood the ICOCs they were forced to sign (a dubious proposition considering the fact that drivers testified on the stand that they did not read the ICOC and often did not receive the ICOC in a language they could understand). Even if drivers did understand these agreements, however, "the fact that those documents [labeling the drivers independent contractors] are unilaterally created and imposed by XPO diminishes the weight to be given them." *Intermodal Bridge Transport*; *see also FedEx*, 361 NLRB 610 (cited for the Board finding that an independent-contractor agreements are not necessarily conclusive evidence of the intent of the parties when one of the parties has not been afforded the opportunity to negotiate the terms of their employee status in the agreement.); *Nat'l Freight, Inc.*, 153 NLRB 1536, 1358–59 (1965) (written agreements are not controlling); *Big E. Conf.*, 282 NLRB 335, 345 (1986) (same). Judge Dibble found that "there is no evidence that in this case the drivers were able to negotiate a change in the agreement to their classification as independent contractors," no matter what they actually believed at the time, and XPO has not introduced any additional evidence on this point. ALJD II at 20. In fact, as Judge Dibble points out, the very language of the ICOC strongly implies that such negotiations is not allowed because XPO may actually terminate the contract if a court issues a decision reclassifying drivers as employees. *Id.*

Thus, the use of the term "independent contractor" in the ICOC must then give way to the bulk of the evidence in the record supporting a finding that drivers believe themselves to be XPO's employees. To begin, perhaps most significantly, a majority of drivers at both San Diego and Commerce have signed union authorization cards seeking to exercise their right to

collectively bargain—there can be no clearer indication that drivers believe themselves to be employees. Further, there is significant evidence in the record and in Judge Dibble's decision that drivers have asserted their employee status by filing claims with the DLSE, by filing claims with the California EDD, and by participating in a class action lawsuit against XPO.

Finally, every single one of the drivers who testified on behalf of Petitioner in the instant hearing gave compelling reasons for why they believed themselves to be employees—from the fact that they applied with XPO to the fact that they receive their work from XPO to the fact that XPO disciplines and even terminates drivers. Tr. 939:11-940:11 (Domingo Avalos, former owner and current second seater); Tr. 1142:16-1143:6 (Jose Alvarez, former second seater and current owner); Tr. 1389:11-15 (Fernando Ramirez); Tr. 1480:5-25 (Gerardo Dominguez, second seater). Moreover, second-seat drivers almost universally testified that they do not consider the truck owners whose truck they use to be their employers. Tr. 975:15-24; 1005:24-1006:14 (Avalos); Tr. 1480:5-8 (Dominguez). Mr. Francisco Bañales summarized his view as follows:

> Q: Okay. And during the time that you've been working out of XPO San Diego, have you considered the owners of the trucks that you drive to be your employers? A: No, never.
>
> Q: And do you consider XPO your employer? A: Yes. He's my employer, yes.
>
> Q: And why do you think XPO is your employer A: Because I, personally, went into the XPO office to apply, to do their training, to do their -- XPO was the one that asked for the drug testing and alcohol testing, and I go directly to them. They're the ones that dispatch me. They're the ones that control me. Basically, the only orders I take is through them.

Tr. 1529:4-16 (Bañales).

Thus, this factor continues to support employee status.

10. XPO Is In The Business

As Judge Dibble twice found, "there [is] no substantive distinction between [XPO's] core business and the function of the drivers."[26] XPO's core business is moving containers for its customers. And drivers perform that exact same work—they move the containers for XPO's customers to and from the customer yards and different rail yards. During the instant hearing, XPO did not introduce any new evidence or arguments supporting a conclusion that it is somehow in a different business that the drivers.

Instead, it appears that XPO is going to rely on the exact argument that Judge Dibble already rejected: that it is in a different business than the drivers because XPO itself is not driving a truck and because the intermodal work it does for its customers involves moves not just by truck but also by rail. This distinction is nonsensical, however, and XPO making this argument is no different than a car manufacturer stating that it was not in the same business as the workers who built the frames for its cars because the manufacturer itself was not building the frames and because its business involved only *completed* vehicles. Allowing this argument to succeed would open the door for every single employer across the country to misclassify their employees by creating a superficial divide between each portion of the work it does and the completed work as a whole. Thus, the Region must reject a narrow conception of this factor and must instead focus on the fact that drivers are *not* performing a function *ancillary* to XPO's business. They are performing a core function without which XPO would be unable to function, and this factor therefore continues to support a finding of employee status.

11. XPO Drivers Do Not In Fact Operate as Independent Businesses And Do Not Possess Real Entrepreneurial Opportunity for Loss or Gain

[26] ALJD II at 21; ALJD I at 22

Although the question of whether a driver is actually operating as an independent business and exercising interpleural opportunity is no longer its own standalone factor, it is worth once again emphasizing that if this was a factor, it would strongly support a finding of employee status. Functionally and legally, XPO's drivers are completely unable to actually operate as independent businesses or to compete with XPO in moving containers for customers. As XPO itself admits, the entire petitioned-for unit works under XPO's authority and there is no evidence in the record that any of the unit drivers also possess and utilize their own operating authority to do work outside of XPO. In fact, two separate witnesses testified that they spoke to XPO about either doing work for XPO utilizing their own operating authority, or using their own operating authority to do work for other companies while also doing work for XPO under XPO's authority. In both instances, XPO either dissuaded the drivers from doing so or outright told them that they could not operate for XPO using their own operating authority. Further, there is no evidence that drivers actually exercise significant entrepreneurial opportunity. The only vestiges of such entrepreneurial opportunity are the professed ability to have a second driver using the truck you own or the ability to get a second truck. But as described above, this so-called opportunity is sharply restricted by the overwhelming level of control XPO exercises over both second-seat driver and over the vehicles that drivers ostensibly own. Thus, there is no question that XPO's drivers do not actually operate as independent businesses.

Even the fact that some drivers have LLCs does not change this conclusion. While a corporate entity may be significant if the worker utilizes that entity to advertise services, work for other entities, and make entrepreneurial decisions, there is no evidence in the record that any driver actually does this with their LLCs because drivers work exclusively for XPO. In fact, as Judge Dibble found, XPO actually incentivized workers to form these entities. Thus, even drivers

who have an LLC or corporation registered to their name do not actually operate as independent businesses.

IV. Conclusion

As both the record in this case and XPO's long history of misclassification cases show, there is no question that XPO's drivers work exclusively for XPO, many of them for years on end, subject to XPO's control, and doing work at the very core of XPO's business—work they would be unable to do but for the instrumentalities supplied by XPO. Furthermore, the evidence also demonstrates that the drivers in San Diego and Commerce all do the same work under the same conditions, subject to the same centralized corporate control and uniform policies, and that XPO treats both facilities as part of one integrated intermodal operation. Thus, there is no question that both truck owners and second-seat drivers are XPO's employees, and that there is an appropriate combined unit comprised of owners and second-seat drivers from both the San Diego and Commerce locations.

DATED: March 14, 2022

JULIE GUTMAN DICKINSON
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HECTOR DEHARO
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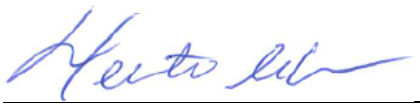
By: 

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Attorneys for Petitioners

STATEMENT OF SERVICE

I hereby certify that a copy of **PETITIONERS' POST-HEARING BRIEF REGARDING PRE-ELECTION HEARING** was submitted by e-filing to Region 21 of the National Labor Relations Board on March 14, 2022.

The following parties were served with a copy of said document by electronic mail on March 14, 2022:

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Respectfully submitted,
/s/ Hector De Haro
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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 848 and LOCAL 542 Petitioners, - and - XPO LOGISTICS CARTAGE, LLC, Respondent.	Case No. 21-RC-289115
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 848 and LOCAL 542 Petitioners, - and - XPO LOGISTICS CARTAGE, LLC, Respondent.	Case No. 21-CA-289133
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Charging Party, - and - XPO CARTAGE, INC., Respondent. .	Case Nos. 21-CA-150873 21-CA-164483 21-CA-175414 21-CA-192602

NOTICE OF CHANGE IN OWNERSHIP AND OF NAME CHANGE

To: Regional Director William Cowen
The Executive Secretary, National Labor Relations Board

WHEREAS, as publically announced on March 25, 2022, STG Logistics, Inc. acquired the intermodal division of XPO Logistics.

WHEREAS, STG has submitted to the Secretary of State documentation officially changing the name, "XPO Logistics Cartage, LLC" to "STG Cartage, LLC."

WHEREAS, STG respectfully requests that the named Respondent in the following matters be changed to "STG Cartage, LLC."

21-CA-289133	21-RC-289115
21-CA-175414	21-CA-192602
21-CA-164483	21-CA-150873
	21-CA-175414

Dated: April 28, 2022

Respectfully submitted,

s/ Howard M. Wexler

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